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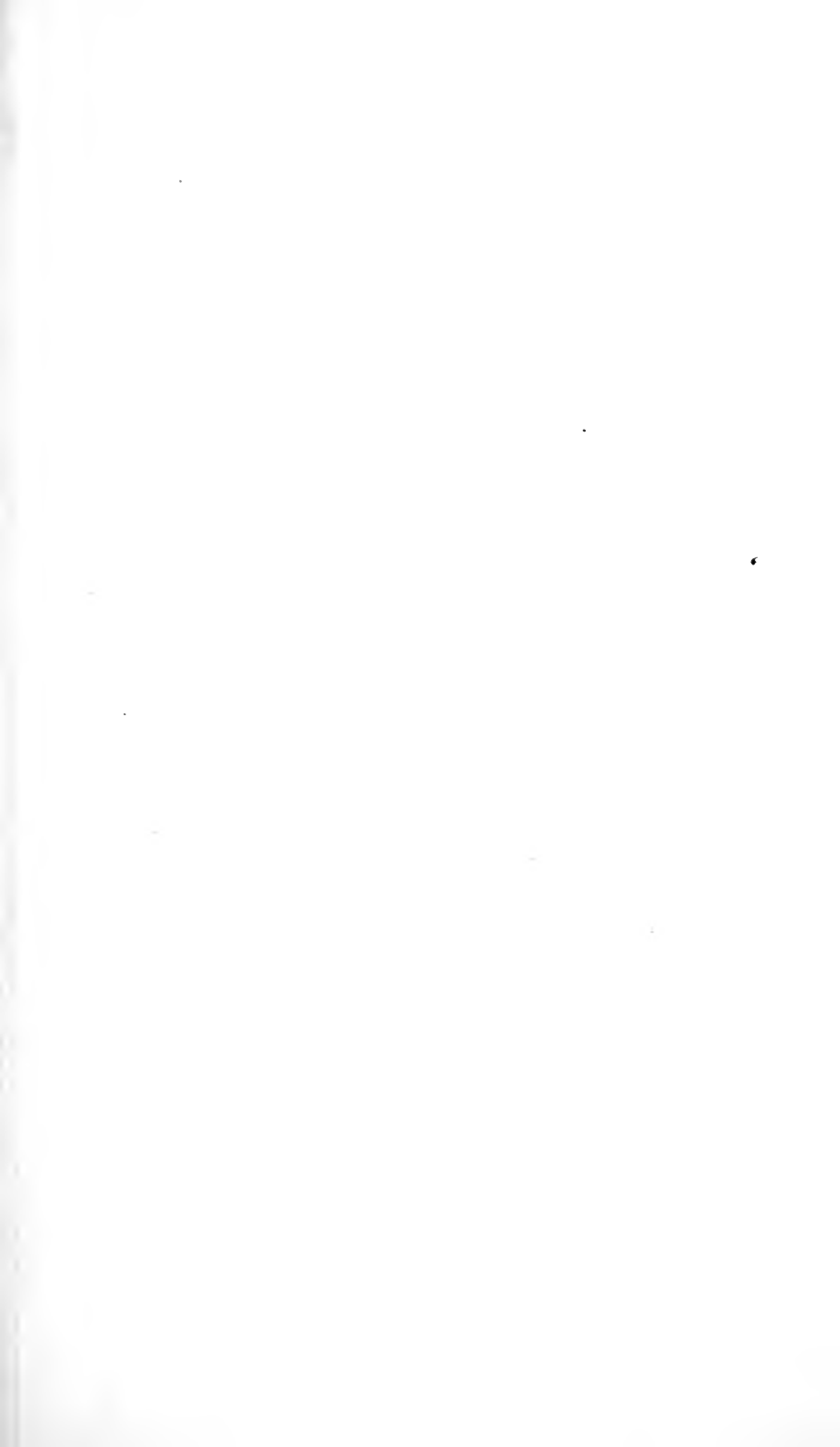
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LEADING CASES SIMPLIFIED.

A COLLECTION OF THE

LEADING CASES OF THE COMMON LAW.

BY

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*Author of "Words and Phrases Judicially Construed," "The
Law of Usages and Customs," "The Contracts
of Common Carriers," etc., etc.*

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PREFACE.

An endeavor has been made in the following pages to present the Leading Cases of the Common Law — the landmarks of the law of to-day in the States of the Union — in a clear, concise and semi-humorous style. While this book is more particularly intended for the law student, it is hoped that (if he can be induced to read it) the general reader will find it interesting, and it is promised that (if he cannot be prevented from reading it) the busy practitioner will find it both entertaining and profitable.

In this little book I have aimed at these results: 1. To give the student a collection of the acknowledged leading cases of the common law. 2. To present these in a style which shall arrest his attention, render it possible for him to acquire their principles readily, and fix those principles in his mind unincumbered by unimportant and sometimes unintelligible facts. To this end only the really leading cases have been selected, and these, instead of being some fifty or sixty, number in all over two hundred, and embrace nearly every branch of the common law of the land. To this end, also, correctness of statement has been adhered to, and humor has never been indulged in at the expense of truth. Therefore, this work differs essentially from a work like the "Comic Blackstone," in this, that while in that the principles of the law are parodied, here the facts, the result, the principles settled

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and the reasons given, are stated as they are found in Coke and Story and Kent, and to the same end I have arranged the cases in logical order, so that the law may be studied systematically and without confusing the many different points which they decide. In adopting the semi-humorous vein, I have tried to make the study of the law less dry to the student than, as a rule, it generally is.

In bringing the following pages more particularly to the notice of the "student," I am keeping in mind the fact that one does not cease to be a student by being admitted to the bar.

It is an old saying that there is no rule without an exception, and I believe that this maxim is nowhere better illustrated than it is by the rules of the common law. Many of these exceptions the student will find stated in the cases themselves, others of them again in the occasional notes to the cases.

In conclusion, I desire to express my obligations to Mr. Shirley, the author of the English work, *Leading Cases Made Easy*, for the most of Smith's *Leading Cases*, which I have either rewritten or adapted, and also for several later ones.

J. D. L.

ST. LOUIS, MO., June, 1882.

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LEADING CASES SIMPLIFIED.

I. — FORMATION OF CONTRACT.

*TWO REQUISITES TO CONTRACT, VIZ.: PRO-
POSAL AND ASSENT.*

WHITE v. CORLIES.

[46 N. Y. 467.]

White was a builder, and Corlies & Co. were merchants, all doing business in New York City. The latter had talked to White about refitting their offices, which negotiations culminated in their sending a note to him in these words:—

“Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.”

Now, if White had known as much about the law as he did six years later, he would scarcely have bought his lumber and commenced work without telling Corlies & Co. that he would take the job. But this is just what he did; and when Corlies & Co. the next day

countermanded the order, there seemed nothing for him to do but to bring an action against them for breach of contract. But here he made a mistake again, for the Court of Appeals of New York decided that there was no contract to sustain an action. They said the rule of law was, that when an offer is made by one party to another when they are not together, the acceptance of it by the other must be made manifest to him. Until that is done there is no contract. True, White had made up his mind to accept, for he bought the lumber and commenced work. But a mental determination, not indicated by speech or put in course of indication by act to the other party, is not an acceptance which will bind the other.

BARTHOLOMEW v. JACKSON.

[20 Johns. 28; 11 Am. Dec. 237.]

Bartholomew and Jackson were farmers and neighbors. A stack of Bartholomew's wheat was in Jackson's field, which Bartholomew had promised to remove in time for Jackson to prepare the ground for sowing. The time having arrived, Jackson sent a message to Bartholomew, which was delivered to his family in his absence, requesting the immediate removal of the wheat as he wanted to burn the stubble. Bartholomew's sons sent back word that they would remove it the next morning. But the next morning they did not appear, and so Jackson, having commenced to burn

the stubble, and believing the stack to be in danger, removed it himself. Jackson thought some one ought to pay him for his trouble, and although the Supreme Court of New York considered it very unworthy of Bartholomew to resist such a claim, they were obliged to decide that he was not legally bound. When Jackson saw Bartholomew's stack in danger of burning and went to work to remove it, he impliedly made an offer to Bartholomew to remove it for him, but it was an offer which was uncommunicated to, and unaccepted by Bartholomew, and therefore there was no contract on which Bartholomew could be held.

*PROPOSAL CANNOT BE RETRACTED AFTER
ACCEPTANCE.*

BOSTON AND MAINE R. CO. v. BARTLETT.

[3 Cush. 224; Langd. Cas. on Con. 103.]

“We will sell you our land for \$20,000 if you will take it within thirty days,” wrote the defendants in this important case, to the officers of the Boston and Maine Railroad Company. The officers of the corporation thought over the matter for some time, and finally several days before the thirty days had expired, notified the defendants that they would accept the offer, tendered them the \$20,000, and asked them to

put their signatures to a deed of the land in proper form. Then the defendants tried to back out of the agreement, but the Supreme Judicial Court of Massachusetts said it was too late to do that. "Though the writing signed by the defendants was but an offer, and an offer which might be revoked," said the court, "yet, while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance, and during the whole of that time it was an offer, every instant; but as soon as it was accepted it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right in saying that the writing, when made, was without consideration, and did not, therefore, form a contract. It was then but an offer to contract; and the parties making the offer, most undoubtedly, might have withdrawn it at any time before acceptance. But when the offer was accepted the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties which constitutes, and is the definition of, a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted, and the bargain completed at once."

BIDDING AT AUCTIONS.

PAYNE v. CAVE.

[3 Term Rep. 148: Langd. Cas. on Con. 1.]

There was an auction sale at which Cave was one of the bidders. A certain article being put up, there was some spirited bidding, Cave's bid of £40 being the last. The auctioneer sang out "going, going, going," but was so long coming to "gone," that Cave said, "Why do you dwell? you will not get more." Still the auctioneer refused to knock the article down, and began, instead, to tell the spectators what a bargain they were letting slip. Cave again interrupted, and asked the auctioneer if he would warrant what he said. The auctioneer refused. "Then," said Cave, "I won't take it." No one else wanting it, the auctioneer was forced to sell it next day at a loss of ten pounds on Cave's bid, against whom he afterwards brought an action for the difference. But Lord KENYON, who tried the case, was of opinion that Cave was at liberty to withdraw his bid at any time before the hammer was brought down, and non-suited the plaintiff. So thought the whole court on appeal. The assent of both parties, they said, is necessary to make a contract binding. This is signified on the part of the seller by bringing down the hammer or calling out "gone" or "sold," which was not done here until the defendant had retracted his offer. An auction is not inaptly called *locus pœnitentiæ* (a place

for repentance). Every bid is nothing more than an offer, which is not binding till accepted.

*PROPOSER MAY PRESCRIBE TIME, PLACE AND
FORM OF ACCEPTANCE.*

ELIASON v. HENSHAW.

[4 Wheat. 225.]

E. & Co. offered to buy flour of H., the answer to be sent by the return of the wagon which carried the offer. H. sent a letter of acceptance, by mail, to another place, which was not the destination of the wagon, having reason to believe that his answer would in this way reach E. & Co. more speedily. The Supreme Court of the United States held that E. & Co. were not bound by the acceptance so sent. An acceptance, said Mr. Justice WASHINGTON, communicated at a place different from that pointed out by E. & Co., and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing. It is no argument that an answer was received at another place. E. & Co. had a right to dictate the terms upon which they would purchase the flour; and, unless they were complied with, they were not bound by them. All their arrangements may have been made with a view to the circumstance of place,

and they were the only judges of its importance. There was, therefore, no contract concluded between these parties.

MACLAY v. HARVEY.

[90 Ill. 525.]

A merchant wanted a milliner. In a neighboring town lived Miss Maclay, who was open to an engagement of this kind. The merchant hearing of her, dispatched a letter offering the situation, and asking for her answer by return mail. Directly she had read the letter, she sat down and wrote her acceptance on a postal card. But instead of putting this in the post-office herself, she gave it to a small boy to post for her, which small boy carried it in his pocket, with his peg-tops and marbles, for four days before he posted it. Meanwhile the merchant had made other arrangements, so that when Miss Maclay reached his store according to the terms of the card which had lingered in the pocket of the small boy, she was notified that her services were not required. The Supreme Court of Illinois held that she could not obtain any damages for the breach of a contract without proving a contract to commence with. She had proved a proposal which required that she should assent by return mail, and as she had not assented by return mail (the small boy being her agent in the matter), but by a mail four days

later, she had failed to show acceptance of the merchant's offer. And judgment was given against the milliner.

BUT NOT OF REFUSAL.

FELTHOUSE v. BINDLEY.

[11 C. B. (N. S.) 869.]

An uncle and nephew having verbally treated for the purchase of a horse by the former of the latter, the nephew wrote to the uncle stating that he understood that he (the uncle) had mistaken the price he held the horse at—thirty guineas was the price, not thirty pounds. To which the uncle replied by letter: “Your price, I admit, was thirty guineas. I offered £30; never offered more, and you said the horse was mine. However, as there may be a mistake about him, I will split the difference. If I hear no more about him, I consider the horse mine at £30 15s.” He heard no more about him; but the horse, nevertheless, was not his, for the court held that there was no contract for his sale. The uncle had no right to impose upon the nephew a sale of his horse for £30 15s., unless he chose to comply with the condition of writing to him. The nephew might have bound his uncle to

the bargain by writing to him ; but as he did not do this, there was nothing but an open offer, which never ripened into a contract.

*OFFER MUST BE ACCEPTED WITHIN REASON-
ABLE TIME.*

LORING v. CITY OF BOSTON.

[7 Metc. 409; Langd. Cas. on Con. 99.]

The citizens of Boston and vicinity, on the morning of May 27, 1837, read this advertisement in their newspapers.

“ \$1,000 reward. The frequent and successful repetition of incendiary attempts, renders it necessary that the most vigorous efforts should be made to prevent their recurrence. In addition to the other precautions the reward heretofore offered is doubled. One thousand dollars will be paid by the city for the conviction of any person engaged in these nefarious practices.

“ SAMUEL A. ELIOT, Mayor.

“ May 27, 1837.”

There had been a similar advertisement offering \$500 reward in the newspapers the day before, and both continued to appear for about a week, when they ceased. No notice of any time during which they

would be in force, or of any revocation of the offer, was ever made by the city authorities. In January, 1841, the Armory House and several other buildings in Boston were burnt down. Loring and another person, suspecting who the incendiary was, concluded to hunt him up and get the reward of four years ago. They pursued the incendiary to New York, had him arrested, brought back, convicted and sent to the State Prison. But when they came to claim the reward they did not succeed so well, for they had to sue the city for it, only to be told by the Supreme Judicial Court of Massachusetts that they could not recover the \$1,000. "The offer of a reward for the detection of a criminal," said Chief Justice SHAW, of pious memory, "the recovery of property and the like is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service, may accept at any time before it is revoked and perform the service; and such offer on one side, and acceptance and performance of the service on the other, is a valid contract made on good consideration, which the law will enforce." But an offer cannot be supposed to last forever, and as there was no limit in terms in the advertisement, then, by a general rule of law, it was limited to a *reasonable time*, that is to say, the service must be done or the offer accepted within a reasonable time after the offer was made. And three years and eight months was not, in the opinion of the Chief Justice and the other members of the court, a reasonable time within which the offer in question could be considered as a continuing offer on the part of the city. And so Loring and his partner went unrewarded for their trouble.

CONTRACTS BY POST.

ADAMS v. LINDSELL.

[1 Barn. & Ald. 681.]

Mr. Lindsell, wool-dealer at St. Ives, one day wrote a letter to Messrs. Adams & Co., woollen manufacturers of Bromsgrove, offering to sell them a quantity of wool at a certain price, but adding that he must have their reply if they wished to close, "in course of post." Now, whereas Bromsgrove is in Worcestershire, Mr. Lindsell was ignorant enough to address his envelope to "Bromsgrove, Leicestershire," and in consequence of that mistake his letter reached its destination several days late. Directly Adams & Co. *did* receive it, thinking the offer a decidedly good one, they wrote off and accepted it. But in the meantime Mr. Lindsell had inferred from their silence that they did not want his wool, and the day before their letter reached him, but after it had been posted, had sold it to some one else.

This action was brought for non-delivery of the wool, and the defendant contended that he had a right to retract his offer till notified of its acceptance, and urged that he could not be bound on his side till the plaintiffs were on theirs. But the court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound

till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then, as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received 'in course of post.' "

TAYLOE v. MERCHANTS FIRE INS. CO.

[9 How. 390; Langd. Cas. on Con. 106.]

Mr. Tayloe (not Taylor) wanted to insure his residence in Richmond County, Virginia. He applied to the local agent at Fredericksburg, and after considerable correspondence between the latter and the head office in Baltimore, the agent, on December 2d, wrote to Tayloe who was then in Alabama, informing him that his application had been approved by the company, and giving him the rates at which they would insure him. The agent having misdirected the letter, it was the 20th of December before it reached him, but the next day (the 21st) Tayloe sat down and wrote the agent a note, telling him to deposit the policy in the bank and enclosing him a check for the premium.

This was received on the 31st, but on the night of the 22d the house was burned down. The insurance company refused to recognize Mr. Tayloe's claim, and the Supreme Court of the United States were called on to decide whether Tayloe's acceptance was complete on the 21st, when he posted his letter, or on the 31st when the agent received it. This, one can understand at a glance, was a very important matter to Mr. Tayloe, for if the court said the 21st was the time, then he would get his insurance money, otherwise not. The company contended that they had a right to withdraw their offer at any time before notice of the acceptance reached them. But the court decided in favor of Tayloe. An offer, they said, made through the mail, impliedly authorizes an answer to be sent in the same way, and the offer cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing his acceptance has been mailed. When Tayloe had mailed his letter of acceptance he had done everything which the offer required him to do. Upon any other view the proposal would amount to nothing and no contract would ever be completed, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for their approval or rejection.

HOUSEHOLD FIRE INS. CO. v. GRANT.

[4 Ex. Div. 216.]

The insurance agent, in Mr. Tayloe's case, received his letter after the house was burned down; and in *Adams v. Lindsell*, the important letter which Mr. Lindsell wrote about his wool, and which he misdirected, did at last reach the wool-manufacturers, though, so far as Mr. Lindsell's interests were concerned, very much behind time. In both of these cases, as we have just seen, the courts decided that the contract was concluded when the letter went into the post-office, without regard to the time when it reached the person to whom it was addressed. But Mr. Grant waited for three years for his letter, which never came, — and it has probably not come yet; still this did not make his case any different from Mr. Tayloe's or Mr. Lindsell's. Here is the way the trouble came about: Mr. Grant, who had some spare cash to invest in stock, wrote to the Household Fire Insurance Company (limited) asking them to allot him one hundred shares in the company. The secretary entered his name on the books, and replied by mail that the shares had been allotted as he desired. Mr. Grant never received this letter, and heard nothing further from the company until three years afterwards, when there came a notice that a matter of \$500 or so was due from him for assessments on his shares. Then Mr. Grant said that he didn't own any shares in the company; that his application had never received an answer, and that there was therefore no contract. But the English Court of Appeal thought otherwise.

“The contract,” said THESIGER, L. J., one of the learned judges who delivered the judgment, “is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord BLACKBURN, ‘put it out of his control, and done an extraneous act, which clenches the matter, and shows beyond all doubt that each side is bound.’ How, then, can a casualty in the post, whether resulting in delay—which in commercial transactions is often as bad as no delivery—or in non-delivery, unbind the parties or unmake the contract? To me it appears that, in practice, a contract complete upon the acceptance of an offer being posted, but liable to be put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer; and I can see no principle of law from which such an anomalous contract can be deduced. There is no doubt that the implication of a complete, final and absolute binding contract being formed as soon as the acceptance of an offer is posted, may, in some cases, lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make

the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post, he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud; and, putting aside this consideration, considerable delay in commercial transactions—in which dispatch is as rule of the greatest consequence—would be occasioned, for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.” And Mr. Grant was ordered to pay his calls.

*UNCERTAIN AGREEMENT DOES NOT MAKE
CONTRACT.*

SHERMAN v. KITS MILLER.

[17 Serg. & R. 45.]

In Pennsylvania, about fifty years ago, old Mr. Sherman told Elizabeth, his niece, that if she would

live with him and keep house for him until somebody married her, he would give her a hundred acres of land. She thought the offer a good one, and kept house for him for several years, and until she was married to a namesake of his ; but, very unlike a woman, she never once, during all this time, asked the old gentleman *what* hundred acres she was to have. By-and-by he died, and as he had never carried out his promise, and she was not even mentioned in his will, she brought a suit against his administrator for the breach of his promise. The administrator did not deny the facts, but said that "one hundred acres of land" was really to indefinite a quantity to form a legal contract which the courts could enforce. The court thought so, too, and Elizabeth went away empty-handed, after listening to the following remarks from the judge, who delivered the opinion of the court: "If a certain explicit, serious promise was made with her, and the promise was certain of some certain thing, it would be binding. * * * But there would, in the present case, be nothing that even a court of chancery could decree performance of, for the promisor himself would not know what to convey, nor the promisee what to demand. If it had been a promise to give her one hundred pieces of silver, this would be too vague to support an action, — for what pieces? fifty-cent pieces or dollars? of what denomination? One hundred cows or sheep would be sufficiently certain, because the intention would be that they should be at least of a middling quality ; but one hundred acres of land, without location, without estimation of value, without relation to anything which could render it certain, does appear to me to be the most vague of all promises ;

and if any contract can be void for its uncertainty, this must be. One hundred acres on the Rocky Mountains or in the Conestoga Manor; one hundred acres in the Mountains of Hanover County, Virginia, or in the Conewango rich lands of Adams County; one hundred acres of George Sherman's mansion place, at eighty dollars per acre, or one hundred acres of his barren lands at five dollars? The promise is as boundless as the terrestrial globe. The party would lie at the mercy of the jury; there would be the same reason for ten thousand dollars damages as for ten cents. The court cannot enforce such an uncertain promise, and the defendant must have judgment."

ZALESKI v. CLARK.

[44 Conn. 218.]

Mrs. Johnson asked Mrs. Clark, a widow, if she would not like to have a bust of her dear departed. Mrs. Clark said she would, very much. Then Mrs. Johnson told her of a friend of hers, named Zaleski, who was a sculptor, and for whom she was drumming up business, and who would do the thing in first-class style. She wouldn't run any risk, for she need not take the bust unless she was satisfied with it. So Mrs. Clark concluded to perpetuate the features of her husband in plaster, and gave Mrs. Johnson a photograph, from which Zaleski made his cast. When it was

finished everybody said that it was a fine piece of work, besides being an accurate representation of the deceased Clark. But Mrs. Clark was not satisfied with it. When the sculptor asked her why, she could not give any reasons — it didn't satisfy *her*, that was all the satisfaction *he* could get. So he brought an action for the price she had agreed to pay, and he lost it. He had contracted to satisfy a woman — a widow, at that. This was something too uncertain for a court of law to attempt to define. If the sculptor had agreed to make a bust perfect in every respect, and one which the defendant *ought* to be satisfied with, the court might have interfered, for that question could be determined by the evidence of experts on the subject. But to undertake to determine that she was satisfied with it was a thing no one but herself could do. It was a very unwise agreement for the plaintiff to make, but he had only himself to blame for it.

*ACCEPTANCE MUST BE IDENTICAL WITH
OFFER.*

JORDAN v. NORTON.

[4 Mee. & W. 155.]

Farmer Norton wrote to Farmer Jordan, offering to buy a particular mare if the latter would warrant her

“*sound and quiet in harness.*” Farmer Jordan wrote back warranting her “*sound and quiet in double harness,*” but saying he had never put her in *single harness*. The mare was taken to Norton’s by an agent, who exceeded his authority (and whose act was immediately repudiated) and then — as the experienced reader will have foreseen — turned out to be unsound. This was Farmer Jordan’s action for the price of the mare, and the real question was whether or not there was a complete contract. This question was decided in the negative. “The correspondence,” said Baron PARKE, “amounts altogether merely to this: that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem.*” It takes two to make a contract, and those two must have agreeing minds. That being so, an offer must be assented to in the precise terms in which it is made.

ACCEPTANCE OF ALTERED PROPOSAL.

BORLAND v. GUFFEY.

[1 Grant’s Cas. 394.]

The *dramatis personæ* of this case are four: (1) Fullwood, an inn-keeper with more debts than he can

conveniently pay ; (2) Borland, a prospective purchaser of Fullwood's inn ; (3) Guffey, a creditor of Fullwood's, and very anxious about his debt ; (4) William Guffey, his son. ACT I., *Scene 1. Borland's House.* — Enter William with a message from his father, that if Borland will not agree to see him paid he will attach Fullwood's property at the inn. To William, Borland replies that he will see his father's debt paid, provided he will not take out an attachment against Fullwood's property, *and will likewise keep quiet and let no person know anything about it.* *Scene 2.* — William returns from his errand and relates what Borland has said. Guffey, Sr., replies that that is satisfactory, but omits to send William back with a message to Borland to that effect. Nevertheless, he refrains from attaching the property. ACT II. — The whole scene is now in the Supreme Court. Borland didn't see him paid, and Guffey has sued him. But much to his disgust he is told that there was no contract, for it was essential that Borland should have been notified of his assent to the new terms in his proposal — the little matter concerning keeping quiet. *Exeunt omnes* to slow music, Guffey minus his money.

PROPOSAL TO UNASCERTAINED PERSON.

WILLIAMS v. CARWARDINE.

[4 Barn. & Adol. 621; Langd. Cas. on Con. 12.]

William Carwardine caused a hand-bill to be printed and distributed which stated that whoever would give such information as would lead to the discovery of the murderer of his brother, Walter, should receive twenty pounds. Soon after this advertisement was issued, Mary Ann Williams was badly beaten by a man she was living with, and believing she had not long to live, and to ease her conscience, she gave information which led to the conviction of the man who had beaten her for the murder of Walter Carwardine. He was hanged, but she recovered and brought an action for the twenty pounds. The jury found that other motives than the offer of the reward had induced her to give the information. Nevertheless, all the judges of the King's Bench expressed the opinion that she was entitled to it. DENMAN C. J.: "The plaintiff by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover." LITLEDALE, J. "The advertisement amounts to a general promise to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information." PARKE, J.: "There was a contract with any person who performed the condition mentioned in the advertisement." PATTISON, J.: "I am of the same opinion. We cannot go into the plaintiff's motives."

MISTAKE AS TO PERSON CONTRACTING.

BOSTON ICE COMPANY v. POTTER.

[123 Mass. 28.]

During the early part of the summer of 1873, the Boston Ice Company supplied Mr. Potter, of the Hub, with ice for his tea and claret, and for the household generally. For some reason or other — perhaps they gave him short weight or too much straw and dirt — he determined to try another ice man, and having heard favorable reports of the Citizens' Ice Company he made a contract with them. For about a year the wagons of the Citizens' Company drove up daily to the door of the Potter mansion, when one morning a wagon of the Boston Company appeared on the scene as of old. From that day forward the Citizens' wagons no longer came that way, but ice was regularly delivered to Mr. Potter's servants by the Boston Company. The reason for this change was that the latter company had bought out the former, ice wagons, horses, and everything including the privilege of supplying ice to the customers of the Citizens' Company. But of this Mr. Potter was sublimely ignorant, and when at the end of the season a bill was presented to him for ice, which had been consumed in his house during several months, and which had been supplied by the Boston Company, he refused to pay it. The company sued for the account, but were unsuccessful. Mr Potter, it was held, had never expressed his assent to a contract for ice with the Boston Company, and there was no implied

assent on his part from his receiving and using the ice, because he had no knowledge that it was furnished by the plaintiff; but supposed that he was receiving it from the Citizens' Company. "A party" said ENDRICOTT, J., "has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant before receiving the ice or during its delivery had received notice of the change, and that the Citizens Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do because the plaintiff failed to inform him of that which he had a right to know. If he had received notice and continued to take the ice as delivered a contract would be implied. A case in England" the judge added, "was very like this. One Jones, who had been in the habit of dealing with Brocklehurst, a pipe-hose manufacturer, sent him an order for fifty feet of leather hose. It happened that that very day Brocklehurst had been bought out by Boulton, his former foreman, who executed the order and sent the goods to Jones, without giving him notice that the goods were supplied by Boulton and not by Brocklehurst.

The Court of Exchequer decided that Boulton could not maintain an action against Jones for their price.”¹

MISTAKE AS TO SUBJECT MATTER.

KYLE v. KAVANAUGH.

[103 Mass. 356.]

Mr. Kyle agreed to sell, and Mr. Kavanaugh to buy, a lot of land on Prospect Street, in the town of Waltham. Now, it happened rather oddly that there were *two* Prospect Streets in Waltham, and when Mr. Kavanaugh was taken round by Mr. Kyle to inspect the land he had bought, he found that it was on the other Prospect Street, and was not the land he had been thinking of at all. So Mr. Kavanaugh refused to take it, and in this he was sustained by the court, it being held that where one party was negotiating for one thing and the other selling another and different thing, and their minds did not agree as to the subject matter, there could be no contract by which either could be bound; and this would be so where there was no fraud on either side — nothing more than a mistake.

¹ Boulton v. Jones, 2 Hurl. & N. 564.

REPRESENTATIONS AND WARRANTIES.

BEHN v. BURNES.

[1 Best & S. 877; 3 Best & S. 751.]

By a charter-party dated the 19th of October, 1860, the plaintiff agreed as “owner of the good ship or vessel called the Martaban, of four hundred and twenty tons or thereabouts, *now in the port of Amsterdam,*” to proceed to Newport and there load a cargo of coals, which she should carry to Hong Kong. Unfortunately, the good ship, the Martaban, was not just then “in the port of Amsterdam,” and did not arrive until the 23d. Wherefore, when she reached Newport, the defendant refused to load a cargo and repudiated the contract. The plaintiff then brought an action, and the question was whether the words “*now in the port of Amsterdam*” amounted to a warranty, the breach of which entitled the plaintiff to repudiate the contract, and the court decided that they did. “Properly speaking,” said WILLIAMS, J., in giving judgment in the Exchequer Chamber, “a representation is a statement or assertion made by one party to the other before or at the time of the contract of some matter or circumstance relating to it. Though it is sometimes contained in the written instrument, it is not an integral part of the contract, and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all

events, marine policies, which stand on a peculiar anomalous footing)¹ is such untruth any cause of action, nor has it any efficacy whatever unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly, with a reckless ignorance whether it was true or untrue. * * *

But with respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty; that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favor."

¹ See *Carter v. Boehm*, *post*, p. 186.

II. — CONSIDERATION.

A CONSIDERATION NECESSARY TO SUPPORT A CONTRACT.

RANN v. HUGHES.

[7 Term Rep. 350.]

More than a hundred years ago Mr. Rann brought an action against Isabella Hughes on a promise which she had made to him to pay him a sum a little less than one thousand pounds, which he claimed to be due from the estate of which she was the administratrix. The Court of King's Bench, the Court of Exchequer Chamber, and finally the highest tribunal in England, the House of Lords, wrestled with the case for a long time, but the upshot of it was that Mr. Rann was informed that he could not recover, as he had not shown any *consideration*, *i.e.*, any benefit in money or anything else which the defendant had received for making the promise. "It is undoubtedly true," said Lord Chief Baron SKYNNER "that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consid-

eration. Such agreement is *nudum pactum ex quo non oritur actio*," the Latin he quoted being an ancient maxim, which being done into English reads: "No cause of action arises from a bare promise."

ADEQUACY OF CONSIDERATION IMMATERIAL.

BAINBRIDGE v. FIRMSTONE.

[8 Ad. & E. 743; Langd. Cas. on Con. 209.]

Firmstone was worse than the man who would borrow your umbrella on a rainy day and then forget to return it; for Firmstone would not only not return it, but if you should remind him of the circumstance would tell you that if you wanted your umbrella you would have to hire the sheriff to get it for you. For this is exactly the way he served Bainbridge. The latter owned two boilers, and one day Firmstone came to him and told him that he would like to borrow those boilers, and take them over to his place and put them on his scales and see how much they weighed. Now, as Firmstone did not want to buy the boilers, or to use them in any other way, this was rather an odd request. But Firmstone promising to return them in good order, Bainbridge, the accommodating neighbor that he was, let him have them. Sad to relate he broke

his promise, and when Bainbridge brought an action laughed in his sleeve, for he had read enough law to know that a contract without a consideration won't hold, and what consideration is there in giving one an opportunity to weigh boilers, argued he. But Lord DENMAN, C. J., thought the suit was "well enough. The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive. The plaintiff might have given or refused leave." And PARTISON, J., thought so too. "I suppose the defendant thought he had some benefit," said he, "at any rate there is a detriment to the plaintiff from his parting with the possession for even so short a time." So that merely "allowing to weigh" is a sufficient consideration for a promise.

BUT CONSIDERATION MUST BE REAL.

WHITE v. BLUETT.

[23 L. J. (Exch.) 36.]

A son had been constantly complaining to his father that he did not give him as much money or the same advantages that he gave the rest of the family.

Finally, one day, he proposed a treaty of peace. "If you won't ask me to pay that note of mine, I won't bother you about these things any more," said the son. "All right," replied the father, who, some time after, died, without destroying it or giving it up. When the executors came in, they found the note among his papers, and brought an action on it against the son, who pleaded his father's promise, without avail. "Is an agreement," cried Baron PARKE, with astonishment, "is an agreement by a father, in consideration that his son will not bore him, a binding contract? Fudge!" His lawyers tried to convince the other judges that it was, but with the same success. "If such a plea as this could be supported," said Chief Baron POLLOCK, "the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do; and that other might say, 'Do not complain, and I will give you five pounds.' It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him badly, or that the bill ought never to have been circulated, and the holder were to say, 'Now, if you will not make any more complaints I will not sue you,' such a promise would be like that now set up. In reality there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked, and the son's abstaining from doing what he had no right to do, can be no consideration."

*FORBEARANCE TO SUE A SUFFICIENT
CONSIDERATION.*

HOCKENBURY v. MEYERS.

[34 N. J. (L.) 346.]

Mrs. Meyers held John Hockenbury's note for \$1,000 which was overdue and unpaid, and she threatened to sue him unless he could find security. He, therefore, wrote to his brother Asa, telling him the fix he was in, and to pacify the lady, Asa, who doubtless was a man of substance, put his name on the back of the note. Two years more passed without Mrs. Meyers seeing her money and then she lost all patience and *did sue*. "You can't get anything out of me," chuckled Asa, "because my promise was voluntary and without consideration." But the court gave judgment against him on the ground that forbearance to sue was enough to support a contract.

*PROVIDED THERE IS A LEGAL CAUSE OF
ACTION.*

PALFREY v. PORTLAND, ETC., R. CO.

[4 Allen, 55.]

One of the glories of the common law was to deny an action for damages occasioned by the death of a hu-

man being. A very disagreeable personage, that figures in the law reports with great frequency, is the modern corporation, which, recognizing its lack of a body to be kicked or a soul to be damned, generally manages to crawl out of its obligations and evade its liabilities by the help of very technical and unrighteous defenses. Between these two Mrs. Palfrey came to grief, as was not strange. Her husband had been killed on a train belonging to the Portland, Saco and Portsmouth Railroad Company, under circumstances of the most atrocious negligence on the part of the company. Its officers agreed to pay her fifty dollars a month during her life if she would not sue them. They carried out their agreement for four years, and then having discovered that there was no statute in Massachusetts or Maine allowing an action against a railroad for killing its passengers or its employees, they told her to go the — work-house, for she had seen the last dollar of *their* money. When she sued them on their promise, they replied that it was without consideration and void, and the court was obliged to give judgment in their favor, because, forbearance to sue is a good consideration, only where there is a *legal cause of action*.

*PROMISE TO DO WHAT PARTY IS BOUND TO
DO INSUFFICIENT.*

REYNOLDS v. NUGENT.

[25 Ind. 328.]

There is nothing to show that Mr. Reynolds, of Indiana, ever distinguished himself in the late war, though at one time his services were certainly at a premium. The township of Tobin offered him a hundred-dollar bounty if he would be one to fill their quota of the draft; he accepted, signed the roll, and pocketed the money. But on his way with Nugent, the recruiting officer, to be mustered in, an agent from Evansville came along, offering \$350 bounty for recruits. "If you want to keep me," said Reynolds, when he heard this, "you have got to come up to Evansville's offer." "We will do it," said Nugent. Reynolds was satisfied, and went to the war. In 1865 he turns up again in a suit for the \$250, which Nugent had not yet paid him. Hard to relate, this patriotic veteran was told by the court that there was no contract, because there was no consideration. A promise to do what a person is bound to do by law is not, they said, a good consideration for another promise. If Reynolds had been a witness, subpoenaed to give his evidence in a lawsuit, and had refused to go unless he was paid extra,¹ or if he had been a sailor who had agreed for a certain sum to work a certain voyage, and

¹ Collins v. Godefroy, 1 Barn. & Adol. 949.

when half way through, he had refused to reef a sail until the captain promised him more pay,¹ in neither of these cases could he have brought an action, for he would have only promised to do what it was already his legal duty to do. And that was just what was the matter here. Nugent had promised him the \$250 to do what he was already bound to do by his contract, and this was not a legal consideration for a contract.

CUMBER v. WANE.

[1 Stra. 426; 1 Smith Ld. Cas. 439.]

Wane owed Cumber some \$75, and wondered how he should pay it. In a genial moment Cumber rejoiced his debtor's heart by telling him that if he paid \$25 it would do. Wane thanked him, sat down quickly and wrote out his promissory note for that amount. But after a while Cumber repented of his generosity, and went to law for the whole amount. Wane pleaded that the plaintiff had agreed to accept \$25 in full satisfaction of the debt of \$75, and that he had paid the \$25. This, though perfectly true, was not considered a satisfactory plea, and the unfortunate Wane was compelled to pay the remaining \$50. The reason was that as Cumber was entitled to the \$25 all the time, there was no consideration for his promise to relinquish the resi-

¹ *Stilk v. Myrick*, 2 Camp. 317.

due. Some philosopher has said that it is easy to be wise after the fact. So thought Wane, as he reflected, that if he had only said to Cumber, "I'll give you my note for \$25, and a pipeful of tobacco," or "I'll pay you \$25 on account, and give you my old pocket-knife in satisfaction of the balance," there would have been a good contract with a good consideration.

MORAL OBLIGATION INSUFFICIENT.

COOK v. BRADLEY.

[7 Conn. 57; 18 Am. Dec. 79.]

Cook *pere* was poor; Cook *filis* was rich. The father must have been very poor indeed, for he was obliged to get his necessary food and clothing from Bradley on credit. The son, hearing that he already owed Bradley \$60, which he could never pay, wrote to Bradley, telling him that he considered the debt one that he (the son) was under an obligation to pay. By and by Cook *filis* died, and Bradley endeavored to collect the amount from his estate. But he found this a very difficult matter. The court into which he brought the letter suggested first that it would be necessary for him to show some consideration for the promise. "The goods I supplied the old man with were neces-

saries, and the son was legally obligated to pay them.” “Not so,” answered the court; “a son is not bound by law to pay past expenditures of his parents.” “At any rate,” replied Bradley, “he was under a moral obligation to support his father.” “Right you are,” returned the court; “but that will not help you, for we cannot find a case in the books in which it has been held that a moral obligation is a sufficient consideration for an express promise. In fact there are a good many to the contrary, and we must give judgment against you,” which they immediately proceeded to do.

BEAUMONT v. REEVE.

[8 Q. B. 483.]

Henry Reeve seduced Caroline Beaumont. They lived together for about five years, when they resolved to separate. In consideration of the cohabitation, Reeve promised to pay her an annuity of £60 a year. But the seducer was also a liar, and this was an action for arrears. It was held, however, that there was no legal consideration for Reeve’s promise, and the woman must do without the annuity.

The student must clearly understand that it was *not* because the contract was *illegal* that it was held to be void,—there was no illegality about it,—but simply because there was not what the law counts a *consideration* for Mr. Reeve’s promise; so that if the contract

had been under seal (where considerations are unnecessary) it would have been binding on him. If, however, *future* and not *past* cohabitation were the consideration, such a consideration would be *illegal*, and would vitiate even the contract under seal.

PAST CONSIDERATION.

BULKLEY v. LANDON.

[2 Conn. 404.]

Bulkley, Someryndike & Co. brought an action against the representatives of the firm of Smith, Taylor & Co., of New York. In their declaration they alleged that the defendants, in consideration that the plaintiffs *would indorse* a note signed by a third person, promised that they, the defendants, would hold themselves liable in the same manner as though they had signed it with their names. The promise, which was in writing, when brought into court hardly bore out their statement, for it was in these words:—

NEW YORK, August 27, 1814.

Messrs. Bulkley, Someryndike & Co. —

GENTLEMEN: In consideration of your *having indorsed* the undermentioned notes drawn by David Taylor in your favor, we hereby hold ourselves accountable to you for them in the same manner as though said notes were drawn by us.

SMITH, TAYLOR & Co.

Though the decision was made by the court on a question of pleading — which by the way is the mode in which most of the rulings on this point occurred — a very important principle in the law of consideration for contracts was announced, though not for the first time, by any means. This principle is that a promise founded on a *past* consideration is not binding; and though the plaintiffs had tried to make a good case by saying “*would* indorse,” the writing itself, which was the only evidence of the alleged contract, said *having* indorsed, — a mere difference in tenses, to be sure, but enough to put the plaintiffs out of court.

LAMPLEIGH v. BRATHWAIT.

[Hob. 105; 1 Smith's Ld. Cas. 222.]

Thomas Brathwait slew Patrick Mahume. But kings were kings then, and the murderer was fortunate enough to have a friend at court. To this friend, then, he resorted in his need, and begged him, in the name of all that was charitable, to go to the king, and intercede for his life. Touched by the appeal, this friend, — Lampleigh was his name, — consented to see what could be done, and “did by all the means he could and many days' labor do his endeavor to obtain the king's pardon for the said felony, *viz.*, in riding and journeying at his own charges from London to Royston, when the king was there, and to London

back, and so to and from Newmarket to obtain pardon for the defendant for the said felony." After Lampleigh had taken all the journeys, and been put to all this trouble, Brathwait, as some slight recognition of his services, promised to give him £100. But the storm blew over; Brathwait cheated the hangman; and now proposed to cheat Lampleigh, too. In answer to Lampleigh's gentle reminder of the promise to give him £100, Brathwait replied very learnedly that no promise is binding unless it is founded on a sufficient consideration, and that what Lampleigh had done was *a mere voluntary courtesy*, quite insufficient to support a promise. "No," said Lampleigh, with much sounder learning, as the event proved, "it was not a mere voluntary courtesy. *You asked me to do it*, and that asking saved it from being a mere voluntary courtesy, and made it a sufficient consideration to found a subsequent promise on." The court thought so, too. Services rendered in the past, however eminent, are not generally a sufficient consideration to support a promise. But a past consideration will support a promise, when it consists of services rendered by the plaintiff at the defendant's request. As this was exactly Lampleigh's case, he got his £100.

Yet before he got it, he had to overcome another objection, which the ungrateful Brathwait interposed. "It doth not appear," said Brathwait, "that he did anything towards the obtaining of the pardon but riding up and down and nothing when he came there." But the court said that did not matter, for labor, though unsuccessful, may form a valuable consideration.

III. — PARTIES.

CONTRACTS OF INFANTS VOIDABLE AND VOID.

FETROW v. WISEMAN.

[40 Ind. 148; Ewell on Dis. of Inf. 22.]

Samuel Wiseman (his acts certainly belied his name) took a promissory note, payable to himself, from Joseph Fetrow, with Joseph's son John as surety. John was at the time an infant—*i.e.*, not yet twenty-one years of age. This was his first foolish proceeding. Being unable to make the amount out of the old man, his next move was to sue the youngster, but when John appeared in court he pleaded the "baby act." The court decided in the infant's favor, and the plaintiff went home a much wiser man. "The contracts of an infant," said the court, "are of three kinds: void, valid and voidable. An agreement which he makes, which is illegal because against a statute or a rule of public policy, or a contract which he has no power to make at all, as appointing an agent or attorney in fact, is absolutely void. A contract for necessities, on the other hand, is as binding on the infant as if he were an adult. All other contracts made by an infant are

voidable only, and when he comes of age he may ratify them and become liable on them. This contract of suretyship was of the latter kind. John might disaffirm or ratify it at his option, and as he had taken the former course, he could not be made liable upon it."

EXCEPT FOR NECESSARIES.

PETERS v. FLEMING.

[6 Mee. & W. 42; Ewell on Dis. of Inf. 56.]

Mr. Fleming was one of those fast collegians whose efforts have contributed so liberally towards the settlement of the law of "necessaries" for infants. During his career at the University of Cambridge, and while under age, he became indebted to a jeweller in the town for several articles of ornament which were supplied to him on tick. Fleming, *pere* who was a wealthy member of Parliament, and could easily have paid it if he had liked, wouldn't look at the bill when it was sent in; if he had, this is what he would have seen:—

	£	s.	d.
A fine gold ring	1	8	0
A ring, engraved crest, etc	0	18	0
A short gold watch chain	2	2	0
A pair of pins	0	18	0
A ring	1	6	0
A ring	1	5	0
A ring repaired, new stone	0	3	6
	8	0	6

So the dealer brought an action against the young man himself when he became of age, and (the judge having left it to the jury to say whether the articles were "necessaries" or not, and they having found that they were,) he got his money. But Mr. Fleming was not satisfied; he desired the opinion of the Court of Exchequer on this interesting point. He soon got it, and found it no more satisfactory than that of the jury, for the court agreed in every respect with the verdict.

"The true rule," said PARKE, B., "I take to be this, that all such articles as are *purely ornamental* are not necessary and are to be rejected, because they cannot be requisite for anyone; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order *to support himself properly in the degree, state and station of life in which he moved*; if they were, for such articles the infant may be responsible."

HUNT v. PEAKE.

[5 Cow. 475; 15 Am. Dec. 475.]

A half a century ago, in the State of New York, young Alexander Peake told pretty Polly Hunt that he would marry her. But he didn't do it, and so she sued him in an action for breach of promise of marriage. "Was Alexander twenty-one years old when

he said he would marry you?" asked the court, and Polly was obliged to admit that he was not. Then the kind-hearted judge, with a savage name, had to tell her that he was sorry for her, but the law could not help her. For in the time when George II. was king of England there was a young lady of fifteen, who was told by the owner of the name (who was over twenty-one) that she should be Mrs. Ward Clarencieux.¹ But he was a gay deceiver, and married some one else, and she sent him a note by the sheriff that she considered it worth £4,000 to miss having such a pretty name. The jury thought it was worth half that sum, at least, and then Mr. Clarencieux retained the best lawyers England had at that time, who made a fine argument in Westminster Hall, which lasted several days, trying to convince the judges that he ought not to be obliged to pay the money. But it was no use. The judges said that an infant's promise was not binding, except for necessities, and a wife, notwithstanding St. Paul, was not a "necessity." But if a person of full age and an infant agreed to marry each other, the former would be bound while the latter would not. Therefore, this young lady of fifteen could bring an action against Mr. Clarencieux, who had reached his majority.

"But, therefore," concluded SAVAGE, C. J., "Polly could not sue Alexander."

¹ *Holt v. Clarencieux*, 2 Stra. 937.

*HUSBAND AND WIFE.***MANBY v. SCOTT.**

[1 Sid. 109; 2 Smith's Ld. Cas. 407.]

Sir Edward Scott, a respectable baronet of the seventeenth century, was not fortunate in his choice of a wife. The lady was fast, and the gentleman was slow; and they failed to hit it off together. Probably, therefore, it was to the no small relief and satisfaction of the worthy baronet when Dame Scott, as the reporters call her ladyship, determined to seek fresh woods and pastures new, and went right away. The good easy man had not enjoyed such peace since the days of his bachelorhood. Twelve years passed away, and one day, at the stately home of England inhabited by Sir Edward Scott, there turned up an exceedingly seedy looking female, who announced herself as Lady Scott, and the mistress of all she surveyed. Her rights, however, were very soon disputed. The baronet was a sensible person, and his pampered menials soon sent the old woman about her business.

This action was brought by a merchant who, although Sir Edward had expressly told him not to do so, had supplied Lady Scott with silks and satins during the time she was living away from her husband. The reader will scarcely be surprised to hear that Mr. Manby did not obtain a satisfactory settlement of his little bill, and *Manby v. Scott* is the chief authority for the principle that the wife's contract does not bind the husband unless she act by his authority.

MONTAGU v. BENEDICT.

[3 Barn. & Cress. 631; 2 Smith's Ld. Cas. 427.]

Mr. Benedict, (the name, as students of Shakespeare will have surmised, is a fancy one) was a hard-working lawyer who lived in a furnished house which he rented, and which was by no means elegant in its appointments. Indeed, he did not keep a man-servant, and these two facts were of importance when he came to be sued by Mr. Montagu, jeweller, who had sold Mrs. Benedict several hundred dollars worth of expensive jewelry without his knowledge. In an action by the jeweller against the husband it was unanimously held that the goods were not necessaries, and he could not be compelled to pay for them. *Montagu v. Benedict* lays down the law of husband and wife this far: If a man without any just cause, turns away his wife, he is bound by any contract she makes for necessaries suitable to her position and estate, and it is the same if they live together and he does not supply her with necessaries. When he himself provides her with necessaries, he is not liable on her contracts unless he assents to them, but his assent may be either express or implied. But the goods must be necessaries, and in this case they were clearly not, for Mrs. Benedict would have been in a better business if she had laid out the money for new furniture for the house instead of useless ornaments which would so ill correspond with the old.

SEATON v. BENEDICT.

[5 Bing. 23; 2 Smith's Ld. Cas. 432.]

Mr. and Mrs. Benedict reappear on the boards. After the little affair of the jewelry, they left the city and went to live in the country. But even in the seclusion of the peaceful hamlet where they settled Mrs. Benedict pursued her extravagant ways. She became indebted to a local store-keeper for gloves, ribbons, muslins, laces, and silk stockings, and finally the merchant sued the husband. The goods supplied were unquestionably necessities, but then Mr. Benedict had always duly furnished his wife with necessary apparel and knew nothing of her clandestine dealings with Seaton; and on this ground the plaintiff was disappointed in his expectations of getting paid. "It may be hard," said BEST, C. J., "on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife."

DEBENHAM v. MELLON.

[6 App. Cas. 24.]

A prudent man was Mr. Mellon. He gave his wife an allowance of \$260 a year for dresses and pin-money,

and also informed her that he was not going to pay for any dry goods or millinery she might choose to buy on credit — she must get along on what she had. In spite of this distinct prohibition, Mrs. Mellon favored a certain store-keeper, one Debenham, with substantial orders for dresses, etc., and he, by and by, favored Mr. Mellon with a substantial Christmas bill. This Mr. Mellon absolutely declined to have anything to do with, and litigation ensued. The store-keeper had not known that Mr. Mellon had expressly forbidden his wife to incur surreptitious debts, and the goods he had supplied were what the law calls “necessaries,” so he felt confident of success. The judges, however, decided against him, and thus “carried to its logical results the principle that the wife’s authority to bind her husband is a mere question of agency.”¹ Then the store-keeper (aided by his brother dry-goods dealers, and shoemakers, and jewellers, who were much alarmed at this announcement of the law) went to the great expense of employing very eminent counsel, and taking the case to the House of Lords. But that tribunal, the highest in England, was of the same opinion as the judges below. “The fact,” said Lord BLACKBURN, “of a man living with his wife always affords evidence that he intrusts her with such authorities as are ordinarily given to a wife. In the ordinary case of the management of a household, the wife is the manager, and, with such tradesmen as a butcher or a baker, she would have authority to pledge her husband’s credit; but even then I do not think the presumption would arise, if the husband gave her the

¹ *Jolly v. Rees*, 15 C. B. (N. S.) 628.

means to procure the articles without credit. In the present case, however, your lordships have to determine whether the wife had a mandate to order clothes, which it would be proper for her in her station of life to have, although the husband had forbidden her to pledge his credit, and had given her money to buy clothes * * * I am of opinion that there is nothing to authorize our holding that the wife had authority to pledge her husband's credit. I agree that if he knew that she had got credit, and had allowed the tradesmen to suppose that he sanctioned the transactions with them, it might well be agreed that there was such evidence of authority, that he could not revoke it without giving notice of the revocation to all who had acted upon the faith of his sanction. The general rule would be that which I have stated; but where an agent is clothed with an authority which is afterwards revoked, those who have dealt with him have a right to say, unless the revocation has been made known to them, that the principal is precluded from denying the continuance of that authority, in the continuance of which he has induced them, as reasonable persons, to believe. There have been many cases where a husband has sanctioned his credit being thus pledged by his wife; but there is no such case here. I cannot agree that the cases have established that the fact of a wife living with her husband alone entitles tradesmen to presume that the husband has given an authority which he is precluded from afterwards denying. I think that in such a case it is open to the husband to prove, if he can, that such an authority does not, in fact, exist, that being a question for the jury. This is not the case of the withdrawal of

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an authority which has been once given ; but the question is, whether the appellants, who had never before dealt with either the wife or the husband, were entitled to assume that the authority was implied from the mere fact of cohabitation, and I do not think that the law gave them any right to do so.”

CONTRACTS OF LUNATICS.

MITCHELL v. KINGMAN.

[5 Pick. 431; Ewell on Dis. of Inf. 522.]

Kingman was sued on a promissory note. “I admit he made the note,” said his counsel, when the case came to trial, “but if your honor will allow, I will show that at the time he signed it, and ever since, he has been an idiot, perfectly incapable of understanding what he was doing, and I think that, under these circumstances, he ought not to be bound.” Then up rose Mr. Mitchell’s lawyer. “It seems to me,” he replied, in a very confident tone, “that I have read in Blackstone that it is a maxim of the common law that no man of full age can be allowed by his own plea to stultify himself, and thereby avoid his own deed or contract; and, if I am not mistaken, Lord Coke makes a remark of a similar character.” “You

are right," said the judge, "we cannot listen to such a plea. Judgment for the plaintiff." But on appeal the Supreme Court of Massachusetts reversed the case, saying that, though true it was that Blackstone and Coke had so written, yet a more enlightened policy had established a better rule, and the law of England now was, and of America had always been, that a lunatic or insane person might avoid his contracts by showing that he was insane at the time they were made.

BAXTER v. PORTSMOUTH.

[7 Dow. & Ry. 614; 2 Car. & P. 178; 5 Barn. & Cress. 170; Ewell on Dis. of Inf. 632.]

On various occasions between 1818 and 1823 the Earl of Portsmouth hired carriages and horses from the plaintiff, Mr. Baxter, or Bagster (there seems to be some difference as to what his real name was, but this is unimportant), and thereby incurred the bill for which this action was brought. It was proved that the plaintiff had no reason to suppose the Earl to be of unsound mind; and that the carriages, etc., were constantly used by him, and were suitable to his rank and station. This being so, the plaintiff's claim was not defeated by its having been found, in 1823, by a commission that the Earl "then was, and from the 1st of January, 1809, continually had been of unsound mind, not sufficient for the government of himself." Imposition or fraud, as a rule, said the court, were grounds for

vacating all contracts, and with respect to a person of unsound mind, if it can be proved that he has been defrauded, or an undue advantage taken of his imbecility, a court will not enforce his contracts. But where there is no imposition practised, and the goods supplied are suitable to his condition and degree, then the mere fact that he is of unsound mind and incapable of making his own contracts will not deprive a person who has given him credit for such goods from suing in a court of law for their value.

KROM v. SCHOONMAKER.¹

[3 Barb. 647; Ewell on Dis. of Inf. 638.]

A crazy fellow in Rochester, New York, who was all the more dangerous for the reason that he was a justice of the peace, was possessed with the idea that Mr. Krom had been committing wholesale forgery, and so, one fine morning, he thought it his duty to issue a warrant for Krom's arrest, wherefore the latter was obliged to spend a whole day in the custody of a constable. When he got out it was not long before there was an action for false imprisonment pending in the courts against Mr. Justice of the Peace, whose friends seeing the fix he was in, interposed the defense that he was insane at the time he issued a warrant. But the

¹ This case properly belongs further on in the book, but is placed here for convenience.

“insanity dodge” had no show in this case. A lunatic, the court said, cannot be punished for crime, but, all the same, he may be sued for an injury done to another. An idiot or other insane person is not a free agent, capable of intelligent voluntary action, and, therefore, he cannot have any guilty intent, which is the very essence of crime. But a civil action to recover damages for an injury may be maintained against him, because in such a case the intent with which the act is done is not material. It must be borne in mind, however, that the measure of damages will generally be less in the case of a lunatic than where a sane man is sued for an injury, for the amount of damages is generally increased by a malicious motive in causing the injury.

CONTRACTS OF CORPORATIONS.

BANK OF COLUMBIA v. PATTERSON.

[7 Cranch, 299.]

There was an old doctrine, that lingered in the courts for many years, to the effect that a corporation could make no contract except by its corporate seal, the reason given being, as expressed by an old-time judge that they were “invisible, immortal, and had no souls,” and, therefore, were incapable of manifesting

their intention by any personal or oral discourse. Corporations had a glorious time of it on the strength of this ; they made all sorts of contracts with all sorts of persons, by the word of mouth or the simple signature of one of their officers or agents ; they looked on and saw the work being done for them, or the things delivered, and then when pay-day came around, they absolutely declined to fork over, and successfully sheltered themselves behind the pitiful defence that the contracts of corporations are not binding unless made under their corporate seal. It is this sort of thing which has earned them the title of "bloated," and which has at the same time rendered them rather unpopular whenever they have been forced to come with their disputes before a jury. But it is a long lane which has no turning, and the whole fabric of corporate exemption and privilege received a terrible shock in the celebrated case which stands at the head of this paragraph.

The facts of the case were very simple. Mr. Patterson was a builder ; the Bank of Columbia wanted a new building. A committee of the stockholders and Patterson made a contract, and he went on and put up the building. But when he asked for payment for his work, the Bank (though it had received the consideration), made a grand effort to keep the building, and at the same time not pay for it, by saying : "We never put our seal to the contract, and, therefore, you cannot hold us." But this sort of morals did not suit the Supreme Court of the United States, which court, though admitting that such was the law anciently, proceeded by the hand of Mr. Justice Story to demolish it for all time. "The technical doctrine" said that

learned judge, “ that a corporation could not contract except under its seal, or in other words, could not make a promise, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it ; for otherwise, the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation ; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie.”

IV. — THE STATUTE OF FRAUDS.

[The independent layman who endeavors to make his contracts without first consulting his lawyer, will frequently regret that he had not been first instructed in the provisions of the Statute of Frauds. Long ago in the reign of that merry ruler, Charles II., a few of the fathers of the law in the English Parliament — Lord Hale among them — passed a statute which was entitled “An Act for prevention of Frauds and Perjuries.” Most laws endeavor to put a stop to the practices which they are designed to prevent, by assessing penalties and punishments upon the refractory individuals, who forget or refuse to keep them. Not so this law, which had for its object the removing of some of the temptations to fraud and perjury, by preventing men, in the case of a large number of agreements, from swearing that they had or had not been entered into, unless there was some writing on the subject. Where one man said that another had promised to do a certain thing, by word of mouth, and the other denied it, it is obvious that even if one of them was not lying, such testimony was very uncertain and unsatisfactory for a judge to have to decide upon, and so that this kind of swearing should be discouraged, this learned Parliament passed the celebrated Statute of Frauds—an enactment which is in force in Great Britain to this day, and whose provisions have been copied into the statute books of almost all, if not all, the States of the Union. The original act has sixteen sections, the fourth and sixteenth being by far the most important. They read thus (the preamble in the quaint English of the time): “For prevention of many fraudulent Practices which are commonly endeavored to be upheld by Perjury and Subornation of Perjury Bee it enacted that noe Action shall be brought”:—

SECT. 4. On any promise by an executor or administrator to answer damages out of his own estate.

On any promise to answer for the debt, default, or miscarriage of another person.

On any agreement made in consideration of marriage.

On any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them.

On any agreement not to be performed within a year from its making.

Unless the agreement or some note or memorandum thereof shall be in writing, signed by the person to be charged or his agent.

Section 16 enacts that no contract for the sale of any goods, wares, or merchandise for the price of £10 or more, shall be good unless the buyer:—

(1.) Accepts part of the goods so sold, and actually receives the same;

(2.) Or gives something in earnest to bind the bargain, or in part payment; or

(3.) Some note or memorandum in writing, of the bargain, is made and signed by the party to be charged, or his agent.

As was to be expected, the courts were soon called upon to interpret the different provisions of this statute. In fact they have kept at it for two hundred years, and are by no means through yet. Indeed, one may say that they have just got a good start.

The most important of the “leading cases” on these important statutory provisions, are the following ones:—]

PROMISE TO ANSWER FOR “DEBT, DEFAULT, OR MISCARRIAGE” OF ANOTHER.

BIRKMYR v. DARNELL.

[Salk. 27; 1 Smith's Ld. Cas. 371.]

Lightfinger wanted somebody to lend him a horse; but who would lend Lightfinger a horse? He was so suspicious a character that everybody he applied to remarked that he was very sorry, but that just at present he was not in the livery business. At last he got the weak side of one Darnell, who had no horses himself, but knew some persons who had. To one of these persons,

named Birkmyr, Darnell went, and, with many expressions of confidence, undertook to be responsible for Lightfinger's bringing safely back any horse that Birkmyr might intrust him with. On the faith of this undertaking—a verbal one of course—Birkmyr let Lightfinger have one of the best horses in his stable, and that gentleman rode away; and, as there were neither railroads nor telegraphs nor police in 1700, neither he nor the horse was ever heard of again.

This being the state of the game, Birkmyr played the only card that was left him: he sued Darnell. This card, however, did not prove the trump he anticipated. He found to his cost that he ought to have taken Darnell's promise in writing. The Statute of Frauds, as we have seen, says that a "promise to answer for the debt, default, or miscarriage of another person" must be *in writing*. Darnell had promised that if Lightfinger did not bring back the horse, Birkmyr might look to him. This was precisely the kind of promise that the statute referred to—a promise where some one else is primarily liable. If John Smith takes his friend Jones to his tailor, and says, "Make this gentleman a pair of trousers, *and if he doesn't pay you, I will*," Jones remains primarily liable, and Smith cannot be sued as surety unless his promise was put in writing. But if Smith should say to the tailor, "Make this gentleman a pair of trousers, *and I will pay you*," no writing would be required to make Smith liable.

PROMISE "IN CONSIDERATION OF MARRIAGE."

SHORT v. STOTTS.

[58 Ind., 29.]

Samuel Short promised to marry Maggie Stotts, and when he went back on his word, Maggie sued him. Brought into court, Mr. Samuel, knowing that his promises had always been by word of mouth, set up the defence that Maggie could not hold him on his agreement until she had produced some writing of his to that effect, relying on the Statute of Frauds to help him out of the scrape. But here he did not succeed, as the court ruled that the statute applied only to agreements "in consideration of marriage," and not to agreements to marry.

"INTEREST IN OR CONCERNING LANDS."

CROSBY v. WADSWORTH.

[6 East, 602.]

Farmer Wadsworth, of Claypole, in Lincolnshire, had a field of likely-looking grass, which Crosby, with an eye to hay, desired to purchase. Meeting casually

one day in June, it was agreed between them that Crosby should have the grass for twenty guineas, only he was to have the trouble of mowing and making it into hay. On this understanding they separated. But, two or three weeks afterwards, Wadsworth again happened to meet Crosby, and remarked pleasantly: "By the way, I've decided not to let you have that grass of mine; I don't think your figure is good enough;" and the same day he sold it to a Mr. Carver for twenty-five guineas, thus clearing a five-pound note by his diplomacy. Mr. Crosby sued Wadsworth for his breach of contract, but, unfortunately, took nothing by that, as it was held that the contract was one which had to do with the land, and therefore should have been in writing, as required by the fourth section of the Statute of Frauds. "I think," said Lord ELLENBOROUGH, "the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands."

*CONTRACTS "NOT TO BE PERFORMED WITHIN
A YEAR."*

PETER v. COMPTON.

[Skin. 353; 1 Smith's Ld. Cas. 432.]

Those who knew him best did not consider Mr. Peter a marrying man. Therefore, it was that Mr.

Compton thought he had got decidedly on the right side of the bargain when, one evening, in casual conversation across the walnuts and wine, this agreement was come to: Peter to pay Compton a guinea down, in consideration that Compton would pay Peter a thousand guineas on his (Peter's) wedding day. Peter promptly paid down the guinea, and Compton pocketed it with a grin. Peter grinned, too.

The next act opens with Peter's wedding day, two years being supposed to have elapsed. Brilliant dresses, lovely bridesmaids, rosettes, church bells, and indigestible cake. But one is conspicuous by his absence. The reader can guess who. When Mr. Peter led Mrs. Peter away from the hymeneal altar, he sat down and wrote an extremely friendly little note to Compton, reminding him of that pleasant evening they spent together two years ago, and requesting the favor of a check for amount due, as per agreement. Compton was considerably taken aback; but, like a sensible man, went straight to his lawyer. That gentleman told him to set his mind at rest; for, said he, in a certain statute, enacted of wise men long ago, it was provided that an "agreement that is not to be performed within the space of one year from the making thereof" should be in writing. "And how," asked the man of law, complacently stroking his chin, "can they make out that this agreement was to be performed within the year, when this sly dog Peter doesn't get married till two years afterwards? Go home, my dear sir, and don't trouble yourself any more about it."

Unfortunately for Compton, this rather plausible view of the law was not adopted by the judges, who

came to the conclusion that the clause in the Statute of Frauds referred only to agreements which, in their terms, were *absolutely incapable of performance within the year*, and required that such agreements only should be in writing. Now, this agreement between Peter and Compton was clearly not “incapable of performance” within the year, for Peter might have got married the very next day. So that it was binding, though not in writing.

CONSIDERATION MUST BE EXPRESSED.

WAIN v. WARLTERS.

[5 East., 10; 2 Smith’s Ld. Cas. 280.]

For Mr. Warlters the Statute of Frauds was decidedly a fortunate enactment. He had a friend named Hall, who became indebted to Messrs. Wain & Co. to the extent of £56, and with no particular means of payment. To extricate this friend from his difficulties Warlters sat down and wrote out the following collateral security :

“ MESSRS. WAIN AND CO. : I will engage to pay you by half-past four this day £56 and expenses on bill that amount on Hall.

“ [Signed] JONATHAN WARLTERS.

“ No. 2, Cornhill, April 30, 1803.”

Hall, of course, did not pay the money. So Wain & Co. sued Warlters on his guarantee. But the document was held to be so much waste paper, *as no consideration for Warlters' promise to pay the £56 was expressed in it.* The Statute of Frauds requires that the "agreement" shall be in writing, and as we have seen, the *consideration* is as much a part of the "agreement" as the *promise*.

*PROMISE TO ANSWER FOR DEBT, ETC., OF
"ANOTHER."*

EASTWOOD v. KENYON.

[11 Ad. & E. 438.]

John Sutcliffe, beginning to feel that he was not the man he used to be, thought it was about time to make his will, and turn his attention to another and a better world. He left everything he had in the way of real property to his only daughter, and named his friend Eastwood executor. But John Sutcliffe was not destined to die just yet; and "mansions in the skies" were not the only estates to which he was busied in making his title clear. Before he died he had sold all the lands mentioned in his will, and bought other lands. Of those he made no will whatever, and when

he died, as he did soon afterwards, they descended to his child as heiress at law. This young lady, at the time of her father's death, was under age, and Eastwood, on the strength of the now useless will (in those days a will did not speak from the time of the testator's death), and the fact that he was an old and dear friend of her father's, took on himself to act as her guardian. But Eastwood, with all his good intentions, was a poor man; and, for the purpose of managing Miss Sutcliffe's affairs, he found it necessary to borrow money. He borrowed £140 from a person named Blackburn, and gave him his promissory note for the amount. By and by Miss Sutcliffe did what all young heiresses, sooner or later, must do — she got married; the fortunate individual being a Mr. Kenyon. Recognizing his claims to his gratitude, Kenyon promised Eastwood verbally that he would pay Blackburn the £140. But somehow or other, when the time came, small as the sum was, Kenyon could not bring himself to part with the money; and finally this action had to be brought on his promise.

Kenyon did not deny that he had made the promise. But he raised two objections to the plaintiff's claim:—

(1.) That his promise was one “to answer for the debt, default, or miscarriage of another person,” and therefore (by the Statute of Frauds), should have been in writing.

This point was overruled, for the judges said that the words in the statute contemplated the promise being made to the creditor, and had no reference when the promise was made, as here, to the debtor himself; it was a promise to answer for the debt of “another” which was required to be in writing.

Beaten from this position, Kenyon retreated to another.

(2.) That there was no consideration for his promise.

And this point was decided in his favor, for a mere moral consideration, as we have seen, is not strong enough to support a promise.

So Eastwood was £140 out of pocket by his executorship.

“*GOODS, WARES AND MERCHANDISE.*”

TISDALE v. HARRIS.

[20 Pick. 9.]

The plaintiff sued the defendant on a verbal contract by which the latter agreed to sell him two hundred shares of stock owned by him in the Collins Manufacturing Company. The defendant had never delivered the stock, and hence this suit, in which he made the defence that it was a contract for the sale of “goods, wares and merchandise,” and not being in writing he could not be bound. The plaintiff vigorously opposed this view of the case, but the court held it was a correct one. “The court are of opinion,” said Chief Justice SHAW, “that as well by its terms as by its general policy, stocks are fairly within its oper-

ation. The words 'goods' and 'merchandise' are both of very large signification. *Bona* as used in the civil law is almost as extensive as personal property itself, and in many respects it has nearly as large a signification in the common law. The word 'merchandise,' also including in general objects of traffic and commerce, is broad enough to include stocks or shares in incorporated companies."

GOODS NOT IN EXISTENCE.

LEE v. GRIFFIN.

[1 Best & S. 272.]

Old Mrs. Pearson ordered two sets of artificial teeth of Mr. Lee, a dentist. The latter made them, but on the day before she was to call at the office to have them fitted the old lady died, and as her executor was already supplied by nature with an efficient array of grinders, the dentist was forced to sue for his bill, which amounted to \$105. The executor set up the defence, that it was a contract for the sale of "goods, wares or merchandise," and should, therefore, have been in writing, as required by the Statute of Frauds, while the dentist contended that, on the contrary, it was work, labor, and materials for which he was suing.

The executor's view was adopted by the court, the rule being stated to be that, if the contract be such *that when carried out it would result in the sale of a chattel*, it is a sale of goods, and not a contract for work and labor.

VALUE OF GOODS.

BALDEY v. PARKER.

[2 Barn. & Cress. 37.]

Mr. Parker has not paid an exorbitant price for fame. He went one day into a shop and bargained for a number of trifling articles, a separate price being agreed on for each, and no one article being priced so high as £10. The articles that Mr. Parker had decided to buy he marked with a pencil, or assisted in cutting from a larger bulk. Then he went home — he always did — to tea, desiring that an account of the whole should be sent after him. This was done, and the sum Parker was asked to pay was £70, *minus* five per cent discount for ready money. This discount he quarrelled with, not considering it liberal enough, and when the goods were sent to him he refused to accept them.

This was an action by the store-keeper against his recalcitrant customer, and the main question was

whether the contract was one “for the sale of goods, wares, or merchandises for the price of £10” within the 17th section of the Statute of Frauds, the honest store-keeper saying that it wasn’t, and the other gentleman saying that it was. The question was decided in the affirmative, the contract having been an entire one, and “it being the intention of that statute,” as HOLROYD, J., said, “that where the contract, *either at the commencement or at the conclusion*, amounted to or exceeded the value of £10, it should not bind unless the requisites there mentioned were complied with. The danger,” he added, “of false testimony is quite as great where the bargain is ultimately of the value of £10 as if it had been originally of that amount.”

ACCEPTANCE AND RECEIPT.

ELMORE v. STONE.

[1 Tann. 458.]

Elmore was a livery-stable keeper, and had a couple of horses for sale, for which he wanted £200. Stone admired the horses, but not the price. Finding, however, he could not get them for less, he sent word he would take the horses, “but, as he had neither servant nor stable, Mr. Elmore must keep them at livery for

him.” In consequence of this message, Elmore removed the horses from his sale-stable into another stable, which he called his livery stable. In an action which he brought for the price, the question was whether such removal was a sufficient constructive delivery to take the case out of the Statute of Frauds, and it was held that it was, as Elmore from that time held the horses, not as owner, but as any other livery-stable keeper might have done. Said Lord MANSFIELD, who delivered the judgment in this case: “There are many cases of constructive delivery. A common case is that of goods at a wharf or in a warehouse, where the usual practice is that the key of the warehouse is delivered or a note is given addressed to the wharfinger, who, in consequence, makes a new entry of the goods in the name of the vendee, although no transfer of the local situation, or actual possession, takes place. Thus in the present case, after the defendant had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor’s stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as the owner of the horses, but as any other livery-stable keeper might have them to keep.”

SHINDLER v. HOUSTON.

[1 Denio, 48; 1 N. Y. 261.]

Houston owned a lot of lumber which was piled on a dock apart from other lumber there, and had been previously measured and inspected. Shindler wanted to buy some lumber, and this particular lot being in view of both, Shindler offered a certain price per foot for it, which Houston accepted, saying, "The lumber is yours." Shindler then told Houston to get the inspector's bill and take it to his agent and he would pay for it. He did so, but payment was refused. Houston then brought an action for the price, but was unsuccessful, the court holding that there had been no sufficient "acceptance and receipt" of the goods to satisfy the statute. It was not denied that there might be a constructive acceptance of goods as in *Elmore v. Stone*, but the court thought that in this case what was relied on as evidence of acceptance and receipt was nothing but the acts and declarations of the parties during the course of the sale. There were no such subsequent acts, as constituted the open recognition of an existing contract; nothing in short to show that Houston considered that the lumber was no longer his property.

CONTRACT CONTAINED IN SEVERAL DOCUMENTS.

BOYDELL v. DRUMMOND.

[11 East, 142.]

Towards the end of the last century Boydell & Co., a great publishing firm in London, determined, with a view to the encouragement of literature and their own remuneration, to bring out a series of engravings of scenes in Shakspeare's plays; and so they issued a prospectus and began vigorously canvassing for subscribers. There were to be seventy-two engravings altogether, four of which were to constitute a number, and at least one number was to be published every year. "The proprietors, however, were confident that they should be able to produce two numbers in the course of every year." The price of each number was three guineas. The student, whose *forte* is arithmetic, will thus perceive that the whole series would not be completed for nine years, and that the total cost would be 54 guineas. Amongst other enthusiasts, if not very appreciative, admirers of the great bard was a Mr. Drummond. He agreed to become a subscriber, and signed his name in a book bearing the title, "Shakspeare Subscribers, their Signatures." He even put his admiration of the dramatist to the still sever test of accepting and actually paying for one or two of the numbers. But his interest soon began to languish, and at last it became necessary to sue

him for not accepting the remainder of the engravings. In defence, Mr. Drummond availed himself of the Statute of Frauds. He said that the agreement he had entered into was one which, by its terms, was incapable of performance within a year from the making, and, therefore, to bind him, should have been writing. The publishers replied to this :—

1. That, Mr. Drummond having taken and paid for several numbers, there was a sufficient “performance” to satisfy the statute, if not Mr. Drummond’s conscience.

2. That, after all, the agreement *was* in writing, for the book in which Mr. Drummond had signed his name, coupled with the publishers’ prospectus, constituted a sufficient memorandum of agreement.

It was held, however, — scarcely to the execution of justice and the maintenance of truth :—

1. That part performance would not do, for the word “*performance*” could not mean anything less than *completion*.

2. That there being no means of connecting the Shakspeare subscribers’ book with the prospectus, without oral evidence — no reference being made by the one to the other — they did not together constitute a sufficient memorandum.

“If,” said LE BLANC, J., “there had been anything in that book which had referred to the particular prospectus, that would have been sufficient ; if the title to the book had been the same with that of the prospectus, it might, perhaps, have done ; but as the signature now stands without reference of any sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it

was the prospectus exhibited in his shop at the time to which the signature related ; the case, therefore, falls directly within this branch of the Statute of Frauds.”

So *Boydell* beat the publishers, and lived happily to the end of his days ; and his case remains the leading authority for the principle that, though a contract may be collected from several documents, those documents must be so connected in sense that oral evidence is unnecessary to show their connection — in other words, they must be left to speak for themselves. It should also be remembered by the student, as an illustration of the clause in the fourth section of the Statute of Frauds, which says that an agreement not to be performed within a year must be in writing.¹

¹ See *ante*, p. 60.

V. — WRITTEN CONTRACTS AND ORAL EVIDENCE.

ORAL EVIDENCE NOT ADMISSIBLE.

GOSS v. NUGENT.

[5 Barn. & Adol. 58.]

Lord Nugent agreed to buy of Mr. Goss several lots of land for £450, and paid a deposit of £80, Mr. Goss undertaking to make a good title to all the lots. This agreement was, as the Statute of Frauds requires it to be, in writing. Soon afterwards Mr. Goss found that as to one of the lots he could not make a good title; and of course Lord Nugent would then have been perfectly justified in crying off the bargain. Instead of doing so, he agreed orally to waive the necessity of a good title being made as to that lot. Afterwards, however, his lordship seems to have altered his opinion as to the desirability of becoming the owner of the land, and he declined to pay the remainder of the purchase-money, relying on the objection to the title. In answer to that, Mr. Goss wished to prove that after Lord Nugent knew about the defect of the title he agreed to waive it. This, however, was not allowed.

So Lord Nugent recovered his deposit, and got the better of Mr. Goss. “By the general rules of the common law,” said DENMAN, C. J., “if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time it was in a state of preparation, so as to add to, or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of Parliament, we think that it would have been competent for the parties by word of mouth to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. * * * But we think the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only.”

PYM v. CAMPBELL.

[6 El. & Bl. 370.]

The defendants agreed to buy from John Pym a three-eighth part of the benefits to accrue from an invention of his. It was agreed that this purchase was only to be made if an engineer named Abernethie approved of the invention. They then made a written memorandum of the agreement, without putting down the condition about Mr. Abernethie's approval. Mr. Abernethie did *not* approve; and the question was, whether the condition could be proved by oral evidence. In giving judgment that the evidence was admissible, ERLE, C. J., said: "The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and, if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. * * * The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but *evidence to show that there is not an agreement at all is admissible.*"

LATENT AMBIGUITY MAY BE EXPLAINED.

SARGENT v. ADAMS.

[3 Gray, 72.]

The defendant entered into a written agreement to lease to the plaintiff the "Adams House," in Boston, for a term of ten years. The defendant had fitted up an old hostelry called the Lamb Tavern, as a hotel, and had christened it the "Adams House." The entrance to the hotel was on Washington Street, and was numbered 371. The rest of the ground floor of the building was fitted up for stores, which were numbered 1, 2, 3, 4, and 5 Adams House. When the time came for the defendant to present the plaintiff with the lease, the latter discovered that it did not include all these stores, but only one of them. He, therefore, refused to accept it, and brought an action to recover back a sum of money which he had advanced to the defendant under the agreement. It would, doubtless, have been hard for the defendant to have shown that he had complied with his agreement had the Supreme Court not allowed him to prove by parol that the agreement originally was that the lease should include only the hotel proper and one of the stores. "The court are of opinion," said the distinguished Chief Justice SHAW, "that this constituted a case of *latent* ambiguity, as that is understood and explained in this department of the law. * * * It falls under that

class of cases where the very general description adopted in a contract will apply to two distinct subjects, and so there is a latent ambiguity."

BUT NOT "PATENT AMBIGUITY."

ASPDEN'S ESTATE.

[2 Wall. jr. 368.]

Mr. Mathias Aspden, a wealthy and eccentric American, died without issue, in London, in the year 1824. There were plenty of relatives to take care of his money, and as they could not agree on the division, a costly and lengthy litigation was the result. Matters were somewhat complicated by the fact that Mr. Aspden left a will in which he devised his estate without further description to his "heir-at-law." Every one of several nephews thought he exactly filled the bill, and one of them was particularly anxious to let the court hear evidence that his uncle always treated him the best, and thought more of him than of the others, in fact, considered him as his heir-at-law. But the court held that there was no *latent* ambiguity to explain here; if it was anything it was a *patent* ambiguity and parol evidence was not admissible to explain that kind. "The difficulty presented in this will,"

said Mr. Justice GRIER, “is not one arising upon a latent ambiguity, as where a testator bequeathes his estate to his nephew, John Smith, and has two or more nephews of that name. On the contrary, the testator has described a certain person, or a certain class of persons, as the objects of his bounty; the description given cannot equally apply to two or more.”

SUPPLEMENTARY CONTRACT MAY BE SHOWN.

MALPAS v. LONDON & SOUTHWESTERN R. CO.

[L. R. 1 C. P. 336.]

A cattle-dealer wanted to send some cattle from Guildford to Islington. They told him at Guildford Station that the beasts would be duly forwarded to King's Cross; but they inveigled him into signing a consignment note by which the cattle were directed to be taken to the Nine Elms Station, which was not so far as the cattle-dealer expected them to go. At this intermediate station they remained and suffered injury from not being fed properly, etc. The company's point was that the consignment note was conclusive evidence of the terms of the contract, and, therefore, that they had never undertaken to carry further than the Nine Elms Station. But for the cattle-dealer it

was successfully contended that the consignment note did not constitute a complete contract, and that parol evidence could be given of the conversation that had taken place between the plaintiff and the company's servants before the consignment note was signed.

In regard to the company's argument that the written contract was conclusive evidence that the cattle were to be carried to Nine Elms and no farther, **ERLE C. J.**, said: "I think that it is not so, because it seems clear on the evidence that there may have been a contract to carry to Nine Elms, and an additional contract to carry the cattle on from thence to King's Cross. The parol evidence, therefore, does not vary or contradict the written document, but only makes an addition to it."

USAGES OF TRADE MAY BE SHOWN.

COOPER v. KANE.

[19 Wend. 386; Lawson, Us. & C. 339.]

A property owner in the capital of the State of New York employed a contractor to grade a lot so as to make it conform to a plan of the streets established by the city. The parties signed a written agreement, which provided that the contractor should excavate the lot and make the necessary embankments within a certain

time, for which the other, when the work was done, was to pay him \$180. As the excavating went on the contractor piled the sand, which was taken out, on an adjoining lot, and as was not strange (for when the work was finished the sand taken out was worth at least \$150), both parties claimed it. "It certainly *was* mine," said the owner, "and our contract does not say that you are to have \$180 *and* the sand for your work." But the contractor answered that it had always been understood in Albany that the material excavated belonged to the excavator, and this was one reason why he had taken the contract so low. In the court, where the parties at last resorted, the contractor offered to give evidence of this custom, but the judge would not allow it and gave the sand to the owner of the property. But on appeal the Supreme Court thought this all wrong, and ordered the court below to permit the contractor to show such a usage, if he could. It was only fair to conclude, they said, that the parties contracted with reference to it.

SOUTIER v. KELLERMAN.

[18 Mo. 509.]

This somewhat novel case calls for a little arithmetical calculation. Mr. Soutier, who was doubtless building a new house, ordered four thousand shingles of a lumber dealer, and paid for them, too. In due

course of time the dealer's wagon came along, and dumped eight large packages of shingles down into Soutier's yard. "It strikes me that there has been something wrong in the count," said Soutier, when he saw the packages, "I guess I'll check them." He went to work and counted them all over, when lo! there were only two thousand five hundred shingles all told. Then he hied his way to the lumber dealer's. "I paid you for four thousand shingles and you have sent me only two thousand five hundred," he vociferated. "How many bundles did you say you received?" calmly returned the lumber man. "Eight bundles," answered Soutier "but what has that to do with it; I paid you for four thousand shingles, not for eight bundles." "Ah," rejoined the dealer, "but you know we never count them, we put them up in bundles of a certain size, and we call two bundles a thousand." "And if there are only seven hundred in the two bundles do you call them a thousand, then?" asked Soutier. "Oh, yes," responded the dealer. "If that's your arithmetic, it isn't mine," said Soutier, and he immediately brought suit for the price of the one thousand five hundred shingles he had not received.

As very often happens, the first court thought the buyer was right and the seller wrong, while the second court thought just the opposite about the case. But unfortunately for Soutier, the second court was the Supreme Court, and so he lost his money. The Supreme Court said that usage was always admissible to explain the meaning of a contract. The court below could never have heard of the

English Rabbit case,¹ or it never would have made such a mistake. In that celebrated case, Mr. Smith leased from Mr. Wilson a rabbit warren, and covenanted that at the end of the term he would leave on the land at least ten thousand rabbits, Wilson to pay him £60 a thousand for all he left. When the lease was up two persons were appointed to count the rabbits, and they reported the number at nineteen thousand two hundred. But when Wilson came to settle he wanted to pay for only sixteen thousand rabbits, on the ground that "thousand," in that part of the country, when applied to rabbits, meant twelve hundred, or a hundred dozen. Smith did not see it that way, and brought an action for nineteen thousand two hundred rabbits, at £60 a thousand. But the court allowed Wilson to show that the custom of the country was just as he had contended; and all the judges of the King's Bench agreed that this was correct law. Therefore, said the Supreme Court of Missouri in *Soutier v. Kellerman*, "the usage of a particular trade is evidence from which the intention and agreement of parties may be implied; and although it cannot control an express contract made in such terms as to be entirely inconsistent with it, yet in express contracts the terms employed may have their true meaning and force best understood by reference to such usage. Evidence of such usage is admitted, not to vary the terms of an express contract, or to change the obligation, but to determine the meaning and obligation of the contract as made. The usage must appear to be so general and well established that knowledge of it

¹ *Smith v. Wilson*, 3 Barn. & Adol. 728; Lawson, Us. & C. 335.

may be presumed to exist among those dealing in the business to which it applies; so that the contract of the parties may be taken to have been made with reference to it. In this country, many articles which are in terms sold by the bushel (a dry measure containing eight gallons), are in fact sold by weight, the bushel being understood to mean a certain number of pounds, and the number of pounds differing in different articles — as salt, wheat, etc. When such custom becomes general and well established, so as to be known to the community, it is obvious that a contract for a given number of bushels must mean the bushel as ascertained by weight, whether, in fact, the number of pounds of the article sold would measure more or less than the real bushel. In the present case there was evidence that a general custom prevailed in the lumber trade of estimating two packs of shingles of certain dimensions as a thousand shingles, without reference to the number of pieces in the pack. If such was the usage of the trade, so general and well established that those buying and selling might be presumed to deal in reference to it, there does not appear to have been any such contract shown in this case as would prevent the usage from applying. The law commissioner seems to have thought that the defendant could not escape from liability, if the contract was at so much per thousand, unless there was an express agreement that two bundles should represent a thousand. This was an incorrect statement of the law in a case where evidence was given of a general usage, that a thousand shingles meant two packs of certain dimensions. Whether there was as full evidence of the usage given as ought to have been given, is not a

question upon which we pass ; but there was evidence of the usage, upon which the party was entitled to have the law differently declared, if the evidence proved the usage as general, well established and known so that contracts might be presumed to be made with reference to it.

USAGE MUST NOT CONTRADICT CONTRACT.

BLACKETT v. ROYAL EXCHANGE ASS. CO.

[2 Crompt. & J. 244; Lawson, Us. & C. 413.]

An insurance company made a policy, which by its terms, was expressed to be on “the ship (that is the body), tackle, apparel ordnance, munition, boat and other furniture of the ship called the Thames” from London to Calcutta. One stormy day during the voyage, a small boat, which was slung upon the outside of the ship, on the quarter, was washed overboard and lost. The underwriters demurred to paying for this, and when they were sued wanted to show a usage of the trade that boats slung as this one was, were not protected by marine policies. But this they were not permitted to do. The evidence did not pretend to explain any ambiguous words in the policy, or to introduce matter on which it was silent; but it was at

direct variance with the words of the policy, and in plain opposition to its language, for whereas the policy imputed to be on the ship, and furniture, and apparel generally, the usage offered was to say that it was not on all the furniture and apparel, but upon only a part, excluding the boat. “Usage,” said Lord LYNCHURST, in a pithy sentence since quoted by a thousand courts, “Usage may be admissible to explain what is doubtful ; it is never admissible to contradict what is plain.”

VI. — ILLEGAL CONTRACTS.

CONTRACTS TO PREVENT COMPETITION.

GULICK v. WARD.

[5 Halst. 87; 18 Am. Dec. 389.]

There were scamps with eyes set on the sweets of the post-office department, long before the days of Star Routes. When James Monroe was President, Gulick and Ward were competitors for the contract to carry the mails between New York and Philadelphia, the Postmaster-general having, under authority of an act of Congress, advertised for proposals for this service. Gulick and Ward concluded that as both could not have it, there was no use cutting each other's throats in the endeavor to make the lowest bid, and so they made an agreement, which they drew up and signed, that if Gulick would withdraw, and not make any offer nor induce any one else to compete, and Ward should get the contract, he should pay Gulick \$1,000 for his magnanimity. The long and short of it was, that Gulick withdrew from the competition, that Ward did get the contract and then, very ungenerously refused to hand over the \$1,000.

Gulick sued him, but without success. The court told him that courts of justice did not sit for the purpose of enforcing contracts against public policy, and his contract with Ward was decidedly one of that kidney. An arrangement which diminishes the number of competitors, lessens the number of proposals, or induces anybody to abandon his intention of making an offer, is directly opposed to the policy of the act of Congress which calls for bids upon the work. It defeats the statute, for it destroys the competition and precludes the advantages which competition is intended to result in. And Gulick saw nothing of that thousand dollars, and lost the contract into the bargain, as his reward for making an illegal agreement.

AGREEMENTS TO INFLUENCE OFFICIALS.

TOOL CO. v. NORRIS.

[2 Wall. 45.]

About the middle of 1861, when the United States government was purchasing arms on an extensive scale, an ubiquitous individual appeared at Washington, and after lobbying around with great energy for a few weeks, obtained a contract from the Secretary of War for twenty-five thousand muskets of the Providence

Tool Company, at twenty dollars each. Norris's exertions were due to the fact that he had been employed by the tool company to get this contract from the government, they agreeing to pay him, in the event of his success, a very handsome compensation. But when the work was done a dispute arose between Norris and the tool company concerning the amount of compensation which he should receive, and the result of it was that he had to bring an action against the company. The jury gave him a verdict for \$13,500. But on appeal, the Supreme Court of the United States (after listening to an able argument by the counsel for the defendants), set the verdict aside, the court holding that Norris could recover nothing for his services, on the ground that all agreements for compensation for procuring favors or contracts from legislative bodies or government officers are against public policy and void.¹

*CONTRACTS IMPEDING THE ADMINISTRATION
OF JUSTICE.*

COLLINS v. BLANTERN.

[2 Wils. 341; 1 Smith's Ld. Cas. 490.]

Amongst other misdemeanants to be tried at the

¹ If the student is in search of a counsel's argument to serve as a model for himself, he will find one in the brief of the counsel for the defendants in the Supreme Court as reported in this case. It is one of the best in the American Reports, its brevity being as conspicuously noticeable as its learning and rhetoric.

Stafford Summer Assizes, 1765, were five persons charged with perjury. It happened, however, that their prosecutor, a Mr. Rudge, was not of that lofty character which would prompt him scornfully to reject a bribe. The perjurers decided that he might be "got at," and they set to work accordingly. A friend of theirs, a disreputable surgeon named Collins, was persuaded to pay Rudge £350 to "square" him; and, to indemnify Collins; the perjurers and another "pal," named Blantern, executed a bond for the payment of £350. There would scarcely seem, however, to flourish among perjurers quite that chastity of honor which is ascribed by some people to thieves in their dealings with one another: for when Collins hinted at the repayment of the money he had advanced he was laughed at for his pains; and when at last he sued on the bond, the perfidious crew successfully pleaded that the consideration for the bond was illegal, and, although it did not appear on the face of the deed, vitiated it.

Said Lord Chief Justice WILMOT, in memorable words, "You shall not stipulate for iniquity. All writers upon our law agree in this — no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back. *Procul O! procul este profani!*"

SCOTT v. AVERY.

[5 H. L. Cas. 811.]

This was an action, by a gentleman whose good ship had gone to the bottom, against a Newcastle Insurance Association, of which both plaintiff and defendants were members. The defendants relied on one of the rules of their association (which the plaintiff as a member had, of course, bound himself to observe), which provided that no member should bring an action on a policy till certain persons, by way of being arbitrators, had ascertained the amount that ought to be paid. In answer to that objection, the plaintiff contended that an agreement which ousts the superior courts of their jurisdiction is illegal and void, and that the rule relied on by the defendants was of such a nature. This view, however, did not prevail. Judgment was given for the defendants on the ground that the contract did not oust the superior courts of their jurisdiction, but only rendered it a condition precedent to an action that the amount to be recovered should be first ascertained by the persons specified. The limitation to the rule that all contracts obstructing or interfering with the administration of the law are illegal and void, was concisely stated by Mr. Justice COLERIDGE, as follows :
“ If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. * * * The courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction which has

been considered a right inalienable, even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting, as they please, the cause of action which is to become the subject-matter of decision by the courts. Covenantee parties may agree that, in case of an alleged breach, the damages rendered shall be a sum fixed or a sum to be ascertained by A. B., or by arbitrators, to be chosen in such and such a manner, and until this be done or the nonfeasance be satisfactorily accounted for, that no action shall be maintainable for the breach."

CONTRACTS VIOLATING LAW.

COWAN v. MILBOURN.

[L. R. 2 Exch. 231.]

Mr. Cowan was, in 1867, the secretary of the Liverpool Secular Society, and the defendant the proprietor of some assembly-rooms in that town. Cowan engaged the rooms for a series of lectures to show that our Lord's character was defective, and His teaching erroneous; and that the Bible was no more inspired than any other book. At the time the defendant let the rooms he did not know the nature of the lectures to be delivered, and when he found out, his religious sensibilities were shocked, and he declined to complete his agreement. The secularist now sued him for breach

of contract, but the court decided that the purpose for which the plaintiff intended to use the rooms was illegal, and the contract, therefore, one which could not be enforced at law. "The question is," said Chief Baron KELLY, "whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land, and that therefore to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I, therefore, do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms."

CONTRACTS VIOLATING STATUTES.

PATTEE v. GREELEY.

[13 Metc. 284.]

It is enacted by statute in Massachusetts that "no person shall do any manner of labor, business or work,

except only works of necessity and charity on the Lord's day." This being the state of the law, a couple of bakers drew up an agreement which, after reciting that one had purchased of the other certain bread routes, bound the other in the sum of \$500 to quit these routes, and not thereafter to interfere with the eaters of bread thereon. To this they set their hands and seals, but even this solemnity did not prevent the defendant from doing just what he had covenanted not to do. Then, when he was sued for the \$500, he was mean enough to set up the defense that the bond had been executed and delivered on Sunday. And this being proved, the court decided that it could not compel him to pay it, the plaintiff being unable to show that the execution on Sunday was a work of either "necessity" or "charity." "Was its execution," said Chief Justice SHAW, "'any manner of labor, business, or work,' within the meaning of the statute? Certainly it was. The Legislature intended to prohibit secular business on the Lord's day, and did not confine the prohibition to manual labor, but extended it to the making of bargains and all kinds of trafficking. The general principle that an action will not lie on a contract made in contravention of a statute is well established."

IMMORAL CONTRACTS.

PEARCE v. BROOKS.

[L. R. 1 Exch. 214.]

The plaintiffs were coach-builders and the defendant, one of the *demi-monde*, had purchased a brougham from them on credit, with an agreement that she might return it before the end of the year on paying the price of its hire. She did return it, but without paying anything, and they brought an action for the price. On the trial there was evidence that one of the partners knew that the defendant was a prostitute, but no direct evidence that either of them knew that the brougham was intended to be used by her in her trade. Baron BRAMWELL instructed the jury that in one sense everything which was supplied to a prostitute is supplied to her to enable her to carry on her trade, as, for instance, shoes sold to a street walker; but that the things supplied, for which no action can be brought on account of the immorality of the contract, must be not merely such as would be necessary or useful for ordinary purposes, and might also be applied to an immoral one, but they must be such as would not be required at all except with that view. The jury bringing their knowledge of the world to bear upon the case, thereupon found a special verdict that the brougham was used by the defendant as part of her display to attract men, and that the plaintiffs knew it was to be used for that purpose, which the judge thought

was a very proper one, as the inference that a prostitute (who swore that she could not read writing), required an ornamental carriage for the purposes of her calling was as natural a one as that a medical man would want a brougham for the purpose of visiting his patients. The defendant therefore had a verdict which was affirmed on appeal, all the judges being of opinion that any person who contributes to the performance of an immoral act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied.

WAGERS.

GOOD v. ELLIOTT.

[3 Term Rep. 698.]

Good, Elliott and Heath were discussing local matters at the cross-roads, when Good happened to remark that that new wagon of David Coleman's was a beauty. "Coleman hasn't any wagon," said Elliott, "he sold it to Susannah Tye long ago." "Nonsense," returned Good. "What will you bet?" said Elliott. "I'll bet you five guineas," said Good, "that Susannah Tye has not bought Coleman's wagon." "I'll take it," replied Elliott. A forfeit was put up in Heath's hands. On inquiry it turned out that Elliott was mis-

taken, and that the wagon was still Coleman's. But he would not pay up, and Good sued him. The question was whether a wager was recoverable at all, and the court decided that except where they are against public policy,¹ or are indecent,² or tend to injure the feelings of third parties,³ wagers are not illegal; but if not paid, may be recovered at law.

¹ On this ground the following wagers have been declared void at common law: That one of the parties would not marry (because contracts in restraint of marriage are void, see *post* p. 102), *Hartley v. Rice*, 10 East, 22; that a certain bird will win a cock-fight (because it encourages cruelty), *Brogden v. Marriott*, 3 Bing. N. C. 88; as to the future amount of the hop duty (because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters-), *Atherford v. Beard*, 2 Term Rep. 610; as to the duration of the life of Napoleon Bonaparte (because it gave one party an interest in keeping the king's enemy alive, and the other an interest in compassing his death by unlawful means), *Gilbert v. Sykes*, 16 East, 150; as to whether a prisoner will be convicted on a criminal charge (because it gives one of the parties an interest in obstructing or corrupting the fountains of justice), *Evans v. Jones*, 5 Mee. & W. 77; as to the result of an election (because it gives each party an interest in corrupting the vote or falsifying the count), *Bum v. Riker*, 4 Johns. 426; *s. c.* 4 Am. Dec. 292; *Vischer v. Yates*, 11 Johns. 21; *Rust v. Gott*, 9 Cow. 169; *s. c.* 18 Am. Dec. 497; *Hill v. Kidd*, 43 Cal. 615.

² Thus a wager as to whether a certain person is a man or a woman, (*Da Costa v. Jones*, 2 Cowp. 729), or as to whether an unmarried woman will have a child by a certain day (*Ditchburn v. Goldsmith*, 4 Camp. 152), is void.

³ So, as said in the principal case, a wager that a young lady who passes for twenty-three years of age is really thirty-three, or that she squints, or has a mole on her breast, would be void. In a later English case *A. and B.*, two rival coach drivers, each bet the other his watch that *Col. R.* would go by his coach to an entertainment that evening. On an action being brought for the stake, *Aubott, J.*, at the beginning of the argument, said: "I doubt whether this wager be legal. The effect of it would be to subject a third party to great inconvenience by exposing him to the importunities of the

The student should remember to note another exception, viz. : that the particular wager shall not be prohibited by statute. In their grandmotherly care for the morals of the citizen, the Legislatures of most of the States have made illegal a variety of wagers, and therefore such bets as come within these statutes will be void, although valid enough at common law.

CONTRACTS IN RESTRAINT OF TRADE.

ALGER v. THACHER.

[19 Pick. 51; 31 Am. Dec. 119.]

Thacher, on selling Alger all his shares in the Boston Iron Company, agreed with him that he would not at any time thereafter, in his own name or in the name of

proprietors of those vehicles; any person who has walked through Piccadilly must be sensible that this is no small inconvenience." When the case came to a decision all the judges were of the same opinion. "A wager like the present," said Lord ELLENBOROUGH, "that a gentleman should go by one of these conveyances rather than another, the decision of which would expose him to improper importunity and interruptions, and would abridge the exercise of his right of electing his own conveyance, certainly exposes him to some inconvenience. What has been said of the inconvenience subsisting in Piccadilly is applicable to this case, and arises from the same circumstances. This wager, then, being pregnant with these consequences to other parties, seems to me to be illegal." *Eltham v. Kingsman*, 1 Barn. & Ald. 683.

another, conduct, carry on, use or employ the art, trade or occupation of an iron founder or caster, or be concerned, interested, employed or engaged, directly or indirectly, in any manner whatsoever, or under any pretense whatsoever, in the business of founding or casting of iron. Alger wanted the agreement to be iron-clad, and not content with ordinary writing, it was executed with all the formality of a seal. But when some years after he came into court to enforce this contract, the judges very calmly told him that it was no use, for this was another of those contracts that are against public policy and void. The agreement excluded Thacher everywhere and at all times from participating in the trade referred to. And then the court proceeded to point out to Alger several reasons why such agreements as this were unreasonable, and could not be listened to for a moment.

1. They injure the parties making them, because they diminish the means of procuring a livelihood and a competency for their families. They tempt improvident persons for the sake of present gain to deprive themselves of the power to make future acquisitions; and expose them to imposition and oppression. Long ago in England, in Henry the Fifth's time, a poor weaver was bewailing the loss of some of his cloth, and declaring that he would follow his trade no longer, when up comes a designing fellow who offers him a trifling sum not to weave any more. The weaver, ready for anything, accepts the money, signs a bond not to work at his trade again, and goes off to the tavern to enjoy himself. Next morning, forgetting all about his agreement of the day before, he gets out his loom to earn his dinner. Mephistophiles, hearing

the noise, pokes his head through the window and points to the bond. The weaver tells him to go to Hades with his bond; he isn't going to starve, and he knows no other trade but weaving. Mephistophiles, however, goes to court with his bond, with poor success as we shall see below.

2. They deprive the public of the services of men in the employments and capacities in which they may be most useful to the community as well as themselves. Dr. Skilful and Dr. Blunderer are surgeons. The former has all the practice until the latter pays him a handsome annuity not to take out his lancet again as long as he lives. It is obviously a good law which makes such an agreement null and void.

3, 4, and 5. They discourage industry and enterprise; diminish the products of ingenuity and skill, prevent competition, enhance prices, and expose the public to all the evils of monopoly. Thus, if all the gas companies in the United States were to induce Mr. Edison, by paying him a couple of millions of dollars, to promise under his hand and seal that he would never invent or erect, or manufacture another electric light in the United States, the bond would not prevent us from having our streets and houses lighted by electricity, invented and manufactured by Mr. Edison, if he should conclude to break his word, which in this instance it is to be hoped he would.

And for these reasons Alger left the court-house without his money, a sadder and a wiser man. He might have fared worse had he lived in the time of the Plantagenets, for when the judge to whom, by his lawyer, the fifteenth-century Mephistophiles sent his bond, read it over, he flew into a passion, using some

very strong language in some very strange French, to the effect that, "If the plaintiff was here he should go to prison, until he had paid a good round fine to the king for his pains, by God."¹

MITCHEL v. REYNOLDS.

[6 P. Wms. 181; 1 Smith's Ld. Cas. 508.]

Leading eastwards from that sweet thoroughfare, Gray's Inn Road, London, is, or till quite recently was, a street called Liquorpond Street. In that street, something like two hundred years ago, there dwelt a prosperous baker. So prosperous was he that he baked himself a fortune, and retired on it into private life. But before retiring he sold his business to the plaintiff, and executed a bond in which he undertook not to carry on the business of a baker *in the parish of St. Andrew, Holborn, for five years*, under a penalty of £50. The baker did not know his own mind. Retirement suited him little, and his fingers were everlastingly itching to be in the pudding. The end of it was that long before the five years were over he was baking away as hard as ever, and in the aforesaid parish, too.

¹ The rather vigorous judgment of HULL, J., in this case is thus reported: "A ma intent vous purres avec demurre sur ley que l'obligation est voide ce que le condition est encounter common ley et per Dieu se le plaintiff fuit icy il irra al prison tanque il ust fait fine au Roy."

Mitchel now sued the perfidious baker on the bond to recover the £50, and, what is more, he did recover it.

Though a contract in *absolute* restraint of trade, is not worth the paper it is written on, a contract in partial restraint of trade (that is where the trading is not to take place within a certain area) may be good. But even here there is another proviso, viz. : that the restraint must be reasonable, that is to say, it must not be greater than will afford a fair protection to the benefited party. The contract of our friend, the baker, was very reasonable — £10 a year for five years was a good deal of money in the seventeenth century, and five years was not more than an ordinary vacation. Besides this, there were other places than this little parish where he could knead and bake to his heart's content, with no fear of interference. And so the agreement was perfectly legal. Thus, and much more to the same effect, spake the court or King's Bench.

CONTRACTS IN RESTRAINT OF MARRIAGE.

LOWE v. PEERS.

[4 Burr. 2225.]

In the ardor of his affection and the hey-dey of his youth, Mr. Newsham Peers was fool enough to sign, seal and deliver a document to this purport : —

“I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself; if I do, I agree to pay to the said Catherine Lowe £1,000 within three months next after I shall marry anyone else.”

Ten years passed away, and then the faithless swain married a girl that was not Catherine Lowe. The injured lady brought an action on the document, but after learned argument it was resolved that it was void as being in restraint of marriage. According to the view of the judges — the only sensible one — Mr. Peers’ promise had *not* been to *marry Mrs. Lowe*, as might seem at first sight to be the case, but he had promised *not to marry anybody except Mrs. Lowe*: so that if that good widow from caprice, or otherwise refused to marry him, he would be compelled to live all his days the celibate and cheerless life of a bachelor.

MARRIAGE BROKAGE CONTRACTS.

CRAWFORD v. RUSSELL.

[62 Barb. 92.]

Jeremiah Russell was a wealthy widower in Ulster County, New York. Christina Roe had her eyes on the old gentleman’s wealth, and made up her mind to

have it ; but recognizing the adage that two heads are better than one, she determined to take her friend Susan Crawford into the secret. Susan thought the idea a splendid one, but refused to move a hand unless she was to share the ducats. "I don't want the money now," said Susan, "but the old man can't live very long, and I will wait for my share till you are a rich young widow." So the two women set to work to draw up an agreement about the matter, and presently they had signed and sealed a contract in these words :

"Susan shall do all she can to aid a marriage between Jeremiah and Christina by her influence and services, and in consideration thereof, Christina faithfully agrees and promises that, in case she becomes the wife of Jeremiah and outlives him, she will pay Susan for her services in this matter \$2,000 in cash, and purchase for her a piano-forte and pay for educating her daughter Kate and give her a gold watch."

Then they laid siege to old man Russell's heart. Susan certainly did her duty. She never left off praising the virtues of dear Christina when he was around, she invited him to her house where the young lady would unexpectedly drop in, she provided refreshments for them, and when the widower began to yield to the charms of the lovely Christina, it was Susan that had to pay for all the wood and oil that was burned during the long winter evenings that he carried on his courting in the Crawford house. At last, in less than a year, the bait was hooked, and Christina became Mrs. Jeremiah Russell. Then as soon as the wedding feast was over, Susan Crawford began to speculate on the date of

the funeral. There she miscalculated very far, for it was twenty years before Jeremiah got ready for the undertaker, but when he did die Christina was a very rich widow, and a very mean one, for she declined to pay her old friend anything. Susan brought an action, but it was no use. The court said that this was a marriage brokage contract, and void. True, the civil law allowed match-makers to receive compensation for their services, its policy appearing to be that all aid rendered in encouraging and establishing marriages was for the good of the nation and productive of public morality, inasmuch as it discouraged fornication, adultery, and concubinage; but the common law looked at the thing in a different light. The latter considered that the effect of such agencies was to encourage influences of a pernicious nature by promoting many unhappy marriages, causing the loss of the influence of parents over their children, holding out false and seductive hopes, by the self-interest of brokage agents — these were regarded as so corruptive in their tendency as to be adjudged wholly illegal and void. So Susan got nothing for her pains, not even the money she had laid out for food, and light, and fire, for the agreement being void, the claim for these fell with it.

COURT WILL NOT AID EITHER PARTY.

HOLMAN v. JOHNSON.

[Cowp. 341.]

Mr. Holman was a tea merchant, doing business at Dunkirk, at which place he sold and delivered to Johnson quite a large quantity of the product of the Celestial Empire. When the time came for him to pay for it, Johnson neglected this little matter, and so Mr. Holman had to go across to England and sue him for the price. Here, Johnson pleaded that the tea had been bought by him to be smuggled into England; that Mr. Holman knew it, and the contract was, therefore, void. Mr. Holman's counsel replied that it was not void, because there was nothing illegal in the contract when made, and he was not responsible for what might be done with the tea after it went out of his hands, and in addition he argued that, even if it was illegal, Johnson was as bad a sinner as Holman in the matter, and it would be very wrong to let him take the tea and the price, too, as his share of the swag.

The court decided that he was right on the first point, and therefore Johnson must pay, but that if the contract had been illegal, Holman would have received no aid from them. Lord MANSFIELD, who delivered the judgment, laid down the rules of law on this question, and the reasons on which they are founded, with great clearness, in the following language: "The objection that a contract is immoral or illegal as between plaintiff

and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*.¹ No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*,² or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*.''³

¹ No cause of action can grow out of a questionable transaction.

² "From a scaly dealing."

³ The one in possession has the "inside track."

*EXCEPT WHERE ILLEGAL PURPOSE IS NOT
COMPLETED.*

SPRING CO. v. KNOWLTON.

[103 U. S. 49.]

The officers of the Congress and Empire Spring Company, in New York, formed a nice little scheme for the benefit of themselves and other stockholders, viz. : to increase the stock to the amount of \$200,000, every old stockholder to have a full-paid \$100 share for \$80. A paper was passed round among them, to the effect that whoever did not pay the whole of the \$80 when called for by the company, would submit to forfeiting what he had paid. This was signed by the stockholders, among them being Mr. Knowlton, vice-president of the company. Having taken more of the new stock than he could carry, Knowlton was unable to pay more than twenty per cent on it, and in pursuance of the agreement, his payments were forfeited. It is here important to note that this whole scheme of increasing the stock in this way was in violation of the law of the State, and therefore illegal and void. A little while after, impressed either by fear of the law, or the unrighteousness of the affair, the company concluded to abandon the whole thing, and refunded the money which had been paid for the new stock. But they made no effort to pay the forfeited sums, and so the executor of Mr. Knowlton, who had meantime died, brought an action in the Federal court to recover his money which had been forfeited in this way.

The company set up the highly moral defence, that no tribunal would aid a party to an illegal contract in getting his money back. But the court replied that every judge sat for just this thing, if it appeared that the contract had not been completed when the aid was asked for. There was always time for repentance until the illegal affair was consummated. "It is as old as Comyns,"¹ said Mr. Justice WOODS, "that where money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so and recover back, by action, for money had and received." Luckily for the plaintiff, the company had weakened in its unlawful scheme, and he must have his money. And the court gave judgment for the Knowlton estate for the sum asked, which by this time amounted to something over fourteen thousand dollars.

¹ Sir JOHN COMYNS, Chief Baron of the Court of Exchequer, who about the year 1762 wrote a digest of the laws of England.

VII. — PERFORMANCE OF CONTRACTS.

DISCHARGE BY ACT OF PROMISEE.

PECK v. UNITED STATES.

[102 U. S. 65.]

Mr. Peck entered into a contract with the proper officers of the United States to furnish and deliver a certain quantity of wood and hay at the military station at Tongue River by a certain day. All the parties intended that the hay should be taken from Big Meadows in the Yellowstone Valley, for there was to be found the only available grass for hundreds of miles. The time for the completion of the contract approached and as Mr. Peck seemed to be going too slow, and it was absolutely necessary that the station should have the hay, the government officers, fearing that he would not be able to carry out his contract, but not waiting till the time for its completion expired, allowed other parties to go into the Big Meadows and cut the hay for them. Of course, Mr. Peck could not get the hay now, and so failed to carry out his contract. It was held, however, in the Supreme Court of the United States that he could not be made

to suffer for it, as it was not his fault. The supply of hay that he had depended on had been taken away by the United States through its agents. They had hindered and prevented him from performing his part of the agreement; and it was a sound principle of law that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.

DISCHARGE BY ACT OF LAW.

BAILY v. DE CRESPIGNY.

[L. R. 4 Q. B. 180.]

People do not, as a rule, choose as eligible sites for residence purposes the land adjacent to a railroad depot. For this reason, the plaintiff in this case had certainly good cause to complain of the way he was treated. He had taken a lease of a house and grounds for eighty-nine years from a party with the ornamental name of De Crespigny, and desiring to be select in his surroundings, had taken a deed from that gentleman in which Mr. De Crespigny covenanted with the plaintiff "that neither he (De Crespigny) nor his heirs and assigns should or would during the term, permit to be built on the paddock fronting the premises demised by the deed towards the north, any

messuage or dwelling-house, coach-house or stable, or other erection, save and except summer or pleasure houses in private garden ground, and also a church or chapel at the eastern extremity of the paddock.” This was in 1840. Twenty-five years rolled by when one day a crowd of workman appeared on the scene, and in a few weeks there arose on the sacred paddock opposite the plaintiff’s residence, a building that was neither a summer-house, church nor chapel, but on the contrary, to quote the language of the plaintiff’s declaration, “certain erections other than those in the deed excepted, to wit: a railway station with the appurtenances thereof, including water-closets and urinals.” Of course this was more than he could stand, and he immediately repaired to his lawyer and commenced an action against Mr. De Crespigny for breach of the covenant in the deed as to erections. The latter replied that *he* had not built the railway station; it had been built by the London & Brighton Railway, which company had compulsorily purchased the paddock from him by virtue of this somewhat despotic power given to them by their charter. He did not want to part with this property in that way, and was as much incensed about it as the plaintiff, but the law compelled him and he could not help himself. The Court of Queen’s Bench, after hearing Mr. De Crespigny’s plea, decided that it was a good defence, and that the plaintiff could not recover anything. It was a case of an agreement rendered impossible by law and for failure to perform it there could be no liability. “The substantial question,” said the court, “is whether the defendant is discharged from his covenant by the subsequent act of parliament which put it out of his

power to do so. We are of opinion that he is so discharged, on the principle expressed in the maxim, *lex non coget ad impossibilia*.”¹

IMPOSSIBILITY OF PERFORMANCE.

TAYLOR v. CALDWELL.

[3 Best & S. 826.]

In 1861, Mr. Caldwell agreed to let Mr. Taylor have the Surrey Gardens and Music Hall for four specified summer nights, on which Mr. Taylor proposed to entertain the British public with bands, ballets, aquatic sports, fire-works, and other festivities. Unfortunately, before these summer nights arrived, Mr. Caldwell's premises were destroyed by an accidental fire. Mr. Taylor had been put to great expense in preparing for his entertainment, and he submitted that, as the contract was an absolute one, Mr. Caldwell must pay damages for the breach. It was held, however, that the parties must be taken to have contracted on the basis of the continued existence of the premises, and, as they had been burnt down without the fault of either party, both parties were excused.

The law applicable to such cases was thus summed up by BLACKBURN, J.: “There seems to be no doubt that where there is a positive contract to do a thing

¹ The law does not compel a man to perform impossibilities.

not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome, or even impossible. But this rule is only applicable where the contract is positive and absolute, and not subject to any condition, either express or implied; and there are authorities which establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused, in case, before breach, performance becomes impossible, from the perishing of the thing without default of the contractor."

IMPOSSIBILITY BY ACT OF GOD.

ROBINSON v. DAVISON.

[L. R. 6 Exch. 269.]

An eminent pianist, known professionally as Miss Arabella Goddard, was the wife of the defendant in

this case, Mr. Davison. Mr. Robinson, whose business was that of a concert manager, made a contract with Mr. Davison that his wife should perform at a concert on the night of the 14th of January, 1871, for a certain sum of money. The former got everything ready for the performance, but on the morning of the 14th, instead of Mrs. Davison, there came a letter from her, saying that she was too ill to attend the concert, and inclosing a medical certificate to that effect. This did not suit Mr. Robinson at all, and so he brought an action for the breach of the contract. But all the court held that the sickness, if real, was a good excuse. "This is a contract," said Baron BRAMWELL, "to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that, by virtue of the terms of the original bargain, incapacity either of body, or mind, in the performer, without default on his or her part, is an excuse for non-performance. Of course, the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so, and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional, and not absolute." Baron CLEASBY was of the same opinion. Said he: "This is a contract that a lady should perform as a pianist; that is, should undertake a duty requiring a high degree of skill and taste, and one which, if not performed properly, can hardly be said to have been performed at all. It is, moreover, a duty which could not be done by a deputy, but only by the lady herself,

and that being so, I think that disability or incapacity caused by the act of God excuses the defendant. The whole contract between the parties was based upon the assumption by both that the performer would continue living and in sufficient health to play on the day named. This was really the very foundation of the promise, and when the foundation fails the promise built on it must fail also."

DEWEY v. UNION SCHOOL DISTRICT.

[43 Mich. 480.]

The school directors of a town in Michigan hired a teacher for ten months at a salary of \$130 a month. He had no more than entered on his duties, before the small-pox broke out in the neighborhood, and raged to such a great extent that the directors did the only proper thing under such circumstances — they closed the school until the epidemic had abated, which was something like three months. At the end of that time the school was re-opened. The schoolmaster went back to his work, and also presented a little bill to the board, for the amount of his salary during his enforced vacation. But the directors replied (there was most likely a lawyer on the board): "The act of God made it impossible for us to keep the school open, and the law books say that the act of God will excuse the failure to carry out a contract." The schoolmaster said

he would see about that, and straightway sued the directors. The defendant's law, the court said, was sound, but, for ministers of public instruction, their misuse of words was horrible. It was not "impossible" to keep the school open at such a time; it was simply "dangerous." The act was not one of absolute necessity, but of strong expediency. Therefore, they did not come within their own definition, and the schoolmaster must have his money.

*RENUNCIATION BEFORE PERFORMANCE DUE
GIVES RIGHT TO SUE.*

HOCHSTER v. DE LA TOUR.

[2 El. & Bl. 678.]

Mr. De La Tour, meditating a tour on the continent, engaged Hochster as his courier at £10 a month, the service to commence on June 1st. Before that day came, however, Mr. De La Tour altered his mind, and told Hochster he should not want him. Without wasting words or letting the grass grow under his feet, and before June 1st, Hochster issued his writ in an action for breach of contract. For De La Tour it was argued that Hochster should have waited till June 1st before bringing his action, for that the contract could not be considered to be broken till then. It was held,

however, that the contract had been sufficiently broken by De La Tour's saying definitely that he renounced the agreement. "Where there is a contract," said the court, "to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and a woman engaged to marry, are affianced to one another during the period between the time of the engagement and the celebration of the marriage. In this very case of traveller and courier, from the day of hiring to the day the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces his engagement."

FROST v. KNIGHT.

[L. R. 7 Exch. 114.]

Mr. Knight promised his sweetheart that, though he could not marry her at once, he would do so the moment his father died. Soon after he repented of his promise, and in the lifetime of his father, told her frankly that he took back what he had said, and would never marry her. Instantly, without waiting for the old gentleman's death, she went to law and recovered, too. "The promisee," said Chief Justice

COCKBURN, “has an inchoate right to the performance of the bargain, which becomes complete when the time for performance arrives. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests.”

CONSTRUCTION OF CONTRACTS.

ROE v. TRANMAR.

[Willes 632; 2 Smith's Ld. Cas. 444.]

A deed bade fair to become void altogether as purporting to grant a freehold *in futuro* — a thing which the law does not allow. It was saved, however, from this untimely fate by the merciful construction that, though void as what it purported to be, it might yet avail as a covenant to stand seised, the court citing the maxim, *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*, which means that instruments ought to be construed leniently with all allowances for the ignorance of people who are not lawyers, in order that, if possible, the transaction may be supported.

*BREACH OF PROMISE OF MARRIAGE.***WRIGHTMAN v. COATES.**

[15 Mass. 1; 8 Am. Dec. 77.]

Miss Maria Wrightman complained that Joshua Coates had broken his promise to make her Mrs. Coates, and had married somebody else. For this she asked damages in a Massachusetts court. There was no express promise on Joshua's part, but there were a number of nice letters, which she produced in court, all written by him, in which he called her his dear Maria, and besides, had he not taken her to singing-school for two years, and always spent at least two other evenings a week in her company? Joshua's lawyer, however, was not satisfied. In the first place he objected that actions of this kind ought to be discouraged by the courts, who should refuse to listen to complaints of this character, and this objection being overruled (for said the court, "We can conceive of no more suitable ground of application to the tribunals of justice for compensation, than that of a violated promise to enter into a contract on the faithful performance of which the interest of all civilized countries so essentially depends"), he fell back on the further objection that, as Maria had not shown an express promise by Joshua, she could not succeed. But here he was overruled again. "That young people of different sexes," said Chief Justice PARKER, "instead of having their mutual engagement inferred from a course of devoted

attention, and apparently exclusive attachment, which is now the common evidence, should be obliged, before they considered themselves bound, to call witnesses or execute instruments under hand and seal, would be destructive of that chaste and modest intercourse which is the pride of our country, and a boldness of manners would probably succeed, by no means friendly to the character of the sex or the interests of society.”

ATCHINSON v. BAKER.

[Peak. Ad. Cas. 103.]

Mrs. Baker was a rich widow; fair, fat, forty, and in every way calculated to crown the felicity of a man of moderate tastes. She yielded to the persuasions of Mr. Atchinson, a widower of the same age, and promised to marry him. At the time of the promise, Mr. Atchinson had all the appearance of being, and no doubt was, a sound, healthy, capable man, and the widow congratulated herself on her approaching nuptial bliss. But before the happy day came, she was disgusted to find — so she said — that her lover had an abscess on his breast; and immediately the fever left her. She vowed she would never link herself to a putrid mass of corrupting humanity. Mr. Atchinson brought an action for breach of promise, and the trial elicited some valuable remarks from Lord KENYON: “If the condition of the parties is changed after the

time of making the contract, it is a good cause for either party to break off the connection. Lord MANSFIELD has held that if, after a man has made a contract of marriage, the woman's character turns out to be different from what he had reason to think it was, he may refuse to marry her without being liable to an action, and whether the infirmity is bodily or mental, the reason is the same; it would be most mischievous to compel parties to marry who can never live happily together."

WILLARD v. STONE.

[7 Cow. 22; 17 Am. Dec. 496.]

Miss Willard had the same kind of trouble with Mr. Stone that Maria Wrightman had with Joshua Coates. When she got him into court he did not deny that he had promised to marry her; but, said he, "When I got back from a journey out West, everybody said that a fellow by the name of Frink had cut me out while I was away, and this was the reason I broke off the engagement." "We cannot listen to evidence like that," the court replied, "for Miss Willard was not responsible for whatever Dame Rumor might say." "But ought I not to be allowed to prove that after our engagement was broken off she used to take long walks at night with Frink, and was often guilty of very gross and indecent familiarities with him." "Certainly," said the court, "evidence of what kind of a character the

female complaining is, is always admissible in actions of this kind. The object of these actions is not merely a compensation for the immediate injury received, but damages for loss of reputation. This, of course, must depend on her general character both before and after the breach of promise." And Miss Willard, on account of these little indiscretions, lost her case.

AN ENTIRE CONTRACT CANNOT BE APPORTIONED.

CUTTER v. POWELL.

[6 Term Rep. 320; 2 Smith's Ld. Cas. 18.]

The defendant had a ship which was about to sail from Jamaica to England, and wanted a second-mate. In answer to an advertisement a suitable person presented himself in the shape of Mr. T. Cutter, and the defendant gave him a note to this effect: —

“Ten days after the ship, Governor Parry, myself master, arrives at Liverpool I promise to pay to Mr. T. Cutter the sum of 30 guineas, provided he proceeds, continues, and does his duty as second-mate in the said ship from hence to the port of Liverpool.”

The ship set sail on July 31st, and arrived at Liverpool on October 11th. But life is very uncertain;

and on the voyage Mr. T. Cutter exchanged the billows of time for the haven of eternity. He had gone on board on July 31st, and had performed his duty faithfully and well up to the time of his death, which occurred on September 20th,—that is to say, when more than two-thirds of the passage were accomplished.

If on these facts the unsophisticated but thoughtful student were asked whether Mr. T. Cutter's family would be entitled to see anything of the 30 guineas, the probabilities are that he would reply, "Certainly; they might not be able to get the whole 30 guineas, but I suppose they would get something for the man's service from July 31st to the time of his death." In this opinion the unsophisticated but thoughtful student would be wrong. "In this case," said one of the judges, "the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage, and the latter was to be entitled either to 30 guineas or nothing; for such was the agreement between the parties." Said another of the judges: "This is a written contract and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive anything under it."¹

¹ The courts at the present day seem to regard the rule in *Cutter v. Powell* as a hard one, and rather favor permitting the party who has not wholly completed the entire contract to recover for what he has done (especially where the other party retains the benefit), less the damage sustained by the latter by reason of the

*MEASURE OF DAMAGES ON BREACH OF
CONTRACT.*

HADLEY v. BAXENDALE.

[9 Exch. 341.]

Hadley & Co. were owners of a steam-mill at Gloucester. It happened that the shaft of the engine broke, and they gave it to the defendant, a carrier, to take to an engineer at Greenwich to serve as a pattern for a new one; the defendant's clerk being informed that the mill was stopped, and that the shaft must be delivered immediately. But through the negligence of the defendant the shaft was *not* delivered promptly, and in consequence Hadley & Co. did not get the new shaft until several days after they otherwise would have done, the mill in the meantime remaining silent and idle, to the pecuniary loss of the proprietors. For the loss of the profits which they would have made if the new shaft had come to them when they expected it, Hadley & Co. brought an action, and the question was whether the damages were too remote. The court held that if the carrier had been made aware that

partial unfulfilment of the contract. Thus, in a recent case where D. hired B. to work for him for seven months at \$15 per month, and B. worked only fifty-nine days and then quit without any good excuse, it was, nevertheless, held that B. might recover from D. the sum that his fifty-nine days' work was worth, deducting the damage to D. from his breach of contract. *Duncan v. Baker*, 21 Kas. 99.

a loss of profits would result from delay on his part, he would have been answerable. But it did not appear that he knew that the want of the shaft was the only thing which was keeping the mill idle, and therefore he could not be liable for the loss of profits.

Hadley v. Baxendale is justly regarded as the leading case on the subject of damages arising from a breach of contract. It lays down the three following rules :

1. Damages which may fairly be considered as naturally arising from the breach of contract, according to the usual course of things, are recoverable.

2. Damages, not arising naturally, but from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract.

3. Where the special circumstances are known to the person who breaks, and the damage complained of flows naturally from the breach of, the contract under those special circumstances, such special damage is recoverable.

PENALTIES AND LIQUIDATED DAMAGES.

KEMBLE v. FARREN.

[6 Bing. 141.]

Courts are very averse to enforcing exorbitant agreements as to damages which parties sometimes in-

troduce into their contracts for a violation of their provisions. Something more than half a century ago an actor and a manager sat down and made an agreement. The actor on his part undertook to act as principal comedian at the manager's theatre (Covent Garden) for four seasons, and in all things to conform to the regulations of the theatre; while the manager agreed to pay the actor £3 6s 8d. a night, and to allow him a benefit once every season. And the agreement contained the clause, "that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof, or any stipulation therein contained*, such party should pay to the other the sum of £1,000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*" For some reason or other — it does not matter what — during the second season the actor refused to act, and the manager now went to law to recover the whole £1,000 mentioned in the agreement, although he was quite prepared to admit that he had not sustained damage to a greater extent than £750.

The manager, however, did not succeed. "That a very large sum," said TINDALL, C. J., "should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered a penalty, appears to be a contradiction in terms; the case being precisely that in which courts of equity have always relieved, and against which courts of law have in modern times endeavored to re-

lieve, by directing juries to assess the real damages sustained by the breach of the agreement.” And so the manager had to be content with £750.

FRAUDULENT CONVEYANCES.

TWYNE'S CASE.

[3 Coke, 80; 1 Smith's Ld. Cas. 33.]

A farmer named Pierce got deeply into debt; and amongst his creditors were two persons named Twyne and Grasper; to the former he owed £400, and to the latter £200. After repeatedly dunning the farmer in vain, Grasper decided to go to law for his money, and had a writ issued. As soon as Pierce heard of this, he took the other creditor, Twyne, into his confidence, and in satisfaction of the debt of £400 made a secret conveyance to him of everything he had. In spite of this deed, however,—in pursuance of the nefarious arrangement between them,—Pierce continued in possession just as if he had never made it. He sold some of the goods, sheared and marked some of the sheep, and in every way acted as if he were the monarch of all he surveyed, and Twyne had nothing to do with it. Meanwhile Grasper went on quietly with his action, got judgment, and consequently the assistance of the sheriff of Southampton, who appeared one day at

the homestead with the intention of carrying off in Mr. Grasper's interest whatever he might chance to find there. This proceeding Twyne, who suddenly appeared on the scene, strongly objected to, for, said he, "everything on this farm belongs to *me*, not to Pierce," and in proof of his assertion, he produced the deed of conveyance.

The question then was whether this deed of conveyance was void within the meaning of an act of Parliament called the 13th Elizabeth (from being passed in the thirteenth year of the reign of that public-spirited queen), which provided that all gifts and conveyances, whether of lands or chattels, made for the purpose of delaying or defrauding creditors, shall be void as against such creditors unless made upon a valuable consideration and *bona fide* to some person not having notice of the fraud. It was pretty clear that Farmer Pierce's gift was for a valuable consideration; but it was not *bona fide*, and therefore it was within the statute, said the court, for the following six reasons:

1. It was impossible that anybody could really be so generous as Farmer Pierce had proposed to be. He had given away everything he had in the world, even down to the boots he was wearing. Such self-denial could only be the cloak of fraud.

2. In spite of his apparent liberality Farmer Pierce did not let one of the things go, but "continued in possession, and by reason thereof he traded and trafficked with others and defrauded and deceived them."

3. The conveyance was made in secret. This was a very suspicious circumstance. If there was no

fraud why was there so much mystery about it? Why was not it done openly?

4. It was made when Grasper had already commenced an action and evidently meant business.

5. There was a trust between the parties, and "trust is the cover of fraud."

6. The deed alleged that the gift was made "honestly, truly and *bona fide*," and that was a very suspicious circumstance in itself.

*RECOVERY OF MONEY PAID UNDER
MISTAKE.*

MARRIOTT v. HAMPTON.

[7 Term Rep. 269; 2 Smith's Ld. Cas. 393.]

This case should impress the student with the wisdom of taking care of the receipt on those rare occasions when he pays his tailor's bill. Hampton, possibly, was not a tailor; but he was no doubt a tradesman of some sort, and in the course of his trade sold goods to Marriott. These Marriott duly paid for and obtained a receipt. But, instead of carefully putting it where he could find it if he wanted it, he put it where he could not find it. By-and-by Hampton, — relying, it may be, on his knowledge of Marriott's care-

less gentlemanly habits, — sent in his bill again with the air of a long-suffering and ill-used creditor. Marriott had a distinct recollection of having paid for the trousers, and said so. Hampton, however, challenged him to show paper, and though Marriott looked high and low for the document, it could not be found, and, as Hampton brought an action, he was obliged to pay over again.

But it came to pass that after a while the missing receipt turned up, and Marriott carried it in triumph to Hampton's shop. "Yes," said that respectable tradesman, "it seems right enough, I own; but excuse me if I say that I have got the money, and I intend to stick to it." Marriott now went to law to force him to repay the money, but the student will be grieved to hear that his efforts were not crowned with the success he deserved. *Interest reipublicæ ut sit finis litium*. It is the interest of the state that litigation should cease, is an old maxim of the law; and all the judges agreed that law suits must stop somewhere. Said Lord KENYON, C. J. : "If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person."¹

¹ So, if a man pays over money with a full knowledge of the facts, but mistaking the law of the case, he cannot recover it back. A sea captain once on a time made a blunder of this sort. He had brought home in his ship a large quantity of treasure, a part of which he gave to a certain admiral under whose convoy he had sailed, not at all in a spirit of gratitude, but believing that he was bound by law to pay it. By-and-by he discovered that the law did not compel him to do anything of the kind, and he brought an action to get it back, but did not succeed. But if the mistake is one

VIII. — SALES.

*WHEN SALE COMPLETE, PROPERTY PASSES
AT ONCE.*

TARLING v. BAXTER.

[6 Barn. & Cress. 360.]

On January 4, 1825, it was in writing agreed between Mr. Baxter, and Mr. Tarling, that the former should sell to the latter a stack of hay, then standing in his field, at the price of £145. Payment was to be made on February 4th, but the stack was to be allowed to remain where it was till May-day. It was not to be cut till paid for. This was held to be an immediate, not a prospective, sale, so that when on January 20th the stack was accidentally burnt down, the loss fell on Tarling, the buyer. “The rule of law,” said BAYLEY, J., “is that where there is an immediate sale, and

of *fact* it is different. Mr. Wheadon found out to his gratification that this was so, after a passage at law with Mr. Olds. The former had bought a lot of wheat of Olds, the quantity being estimated by the size of another pile which both supposed to contain a certain number of bushels, but which subsequently was discovered to contain only that number of half bushels. This being a mistake of fact, Mr. Wheadon succeeded in recovering the excess payment. *Wheadon v. Olds*, 20 Wend. 175.

nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls on the vendee."

UNLESS SOMETHING REMAINS TO BE DONE.

GIBBS v. BENJAMIN.

[45 Vt. 124.]

On the edge of Mr. Gibbs' farm, on Lake Champlain, there was a quantity of wood cut and piled, which Mr. Benjamin agreed to purchase at \$3.50 a cord. It was part of the contract that the parties should meet and ascertain the quantity. This they did a day or two later, but they had scarcely commenced the measuring before they disagreed on the method of doing it. This issue grew into a controversy which was not settled when a flood came along and carried the whole of the wood into the lake. Then Gibbs sued Benjamin for the price, claiming that the latter having previously bought the wood must stand the loss. But the court decided that the property had never passed to Benjamin and that he was, therefore, not liable for the price. "The principle is well settled, and uniform in all the

cases," said REDFIELD, J., "that when anything remains to be done by either or both parties, precedent to the delivery, the title does not pass. And so inflexible is the rule that when the property has been delivered, if anything remains to be done by the terms of the contract before the sale is complete, the property still remains in the vendor. The contract must be *executed* to effect a completed sale, and nothing further to be done to ascertain the quality, quantity, or value of the property. The general rule in relation to the sale of personal property is, that if anything remains to be done by the seller before delivery, no property passes to the vendee, even as between the parties. This rule of law, applied to the facts as reported in this case, retains the property in the wood in the plaintiff, and leaves the contract executory and as a sale incomplete."

WARRANTIES.

CHANDELOR v. LOPUS.

[2 Cro. 2; 1 Smith's Ld. Cas. 238.]

In the days when superstition was rife — for it was half a century before Sir Matthew Hale began to burn witches — it was generally thought that a bezoar stone

was a charm against most of the ills of life; and such stones accordingly brought big prices. Mr. Lopus had a pardonable desire to be exempt from as many of the ills of life as possible, and went to Chandelor's shop — Chandelor was a jeweller — and paid £100 for a stone that the tradesman distinctly told him was a bezoar. Mr. Lopus went away a happy man, but after a short time, finding he was not so free from the ills of life as he expected to be, his suspicions were aroused. He made inquiries, and discovered that his fancied treasure was not a bezoar at all, and was decidedly fitter for mending the highway than for curing anybody's neuralgia.

Under these circumstances, Lopus went to law with the jeweller who had sold him the stone. But he failed, for he was unable to give satisfactory answers to two questions which the judges put to him, viz. : —

1. *Did Chandelor WARRANT this stone to be a bezoar?*

"No," replied Lopus, gloomily, "I can't say he exactly *warranted* it. But he certainly *said* it was a bezoar."

"Very likely," said the court, "but *saying* isn't *warranting*. You cannot recover in contract."

2. *Did Chandelor, when he told you that it was a bezoar, KNOW that it was not?*

"How on earth can I tell," replied Lopus, "what the man knew, or did not know?"

"Then," said the court, "neither can you recover in tort."

The probabilities are, that if Lopus had been a litigant of to-day, he would have succeeded on both points. He would have hit the jeweller *in contract* because "every *affirmation* at the time of the sale of

a personal chattel is a *warranty* if it appears to have been intended as such," and Chandelor's assertion that the stone was a bezoar would, no doubt, be considered sufficient. He would have succeeded *in tort*, because the fact that the defendant was a jeweller would be damning evidence that he knew one stone from another.

IMPLIED WARRANTY OF QUALITY OF GOODS.

JONES v. JUST.

[L. R. 3 Q. B. 197.]

Jones & Co., Liverpool merchants, agreed to buy from Mr. Just, a London merchant, a number of bales of manila-hemp, which were expected to arrive in some ships from Singapore. The hemp did arrive, but, when it was examined, it was found to be so much damaged that it would not pass in the market as manila-hemp; and Jones & Co., who had paid the price before the ships arrived, had to sell it at seventy-five per cent of the price which similar hemp would have realized if undamaged. This was an action by them against the seller, who was admitted to have acted quite innocently in the matter, to recover the difference; and it was held that he must pay it, on the ground that in every contract to supply goods of a

specified description, which the buyer has no opportunity of inspecting, the goods must not only correspond to the specified description, but must also be saleable or merchantable under that description.

The maxim *caveat emptor* (the buyer must look out for himself) generally applies as to the quality of goods sold, and unless there is an express warranty there is no warranty at all. But a warranty is *implied* in the following cases:—

1. When goods are sold by a trader for a particular purpose of which he is well aware, — *e.g.*, copper for sheathing a ship,¹ or a rope for hoisting goods,² or fertilizing manure for a farm,³ or boxes for packing tobacco in,⁴ there is an implied warranty on his part that they shall be reasonably fit for the purpose for which they are bought.

2. When the contract is to furnish manufactured goods they must be of a merchantable quality.

3. In the case of a sale by sample there is an implied undertaking that the sample is fairly taken from the bulk.

4. The custom of a particular trade may require a warranty where none is expressly given.⁵

5. On the sale of chattels there is an implied warranty of title; *i.e.*, that they are the property of the purchaser.⁶

¹ Jones v. Bright; 5 Bing. 533.

² Brown v. Edgington, 2 Mac. & G. 279.

³ Mason v. Chappell, 15 Gratt. 572.

⁴ Gerst v. Jones, 10 Cent. L. J. 150.

⁵ Lawson, Us. & C., sect. 153.

⁶ Thurston v. Spratt, 32 Me. 202; Williamson v. Simmons, 34 Ala. 691.

*WARRANTY MUST BE DURING COURSE OF
SALE.*

HOGINS v. PLAMPTON.

[11 Pick. 97.]

The plaintiff purchased of the defendant a quantity of wine in bottles. After the sale was consummated, and the defendant had received payment in negotiable paper, he wrote out a memorandum of the sale, which he sent to the plaintiff. In this the wine was described as "good fine wine." But when the plaintiff came to open the bottles, he found that it was anything but "good fine wine," — in short, it was very bad sour wine. Then the plaintiff brought an action alleging that the description of the liquor in the memorandum of sale was a warranty that it was good fine wine. But the court held that it was not necessary to decide whether this was so or not, for the reason that the strongest kind of a warranty, *if made after the sale is completed*, is invalid. To support a warranty not given in the course of the sale, there must be a new consideration; for the consideration given for the goods is exhausted by their transfer without a warranty, and there is nothing to support a subsequent warranty.

IX. — PRINCIPAL AND AGENT.

SPECIAL AGENT MUST PURSUE AUTHORITY.

BATTY v. CARSWELL.

[2 Johns. 48; 1 Am. Ld. Cas. 653.]

Mr. Abner Carswell, at the solicitation of his brother, who wanted to raise some money, told his agent that he might sign his (Abner's) name to a note for \$250, *payable in six months*. A few days after, the brother and the agent got together, and the agent signed Abner's name to a note for \$250, payable in *sixty days*. The brother gave this note to a creditor. When it fell due, Abner refused to pay it, and the creditor sued him, but without success, the court deciding that as this was a special authority to do a particular thing in a particular way, the principal was not liable for the act of the agent in executing his power in a different way.

DEATH OF PRINCIPAL REVOKES AUTHORITY.

HARPER v. LITTLE.

[2 Me. 14; 11 Am. Dec. 1.]

In March, 1811, Mr. William Jackson, who resided in Mexico, gave a power of attorney under seal to Harper, authorizing him to sell his real estate in Portland, Maine. On the 8th of January, 1814, Harper, as Jackson's agent, sold the property to Little and received and pocketed the purchase-money. Between these two dates there had been a little misunderstanding between the United States and Great Britain, which had interrupted intercourse between Maine and foreign countries, and, consequently, it was some time after the sale had been consummated that it became known to the parties in Portland that Mr. Jackson had departed this life on the eighteenth day of August, 1813. His executors failing to obtain the purchase-money from Harper, brought an action to recover the property, and were successful under the rule of law that the death of the principal causes an instantaneous revocation of the authority of the principal.¹

¹ "A few illustrations," says the writer of a forcible article on this subject, published a few years ago (see 6 Cent. L. J. 383), "will serve to show how technical and artificial are the reasons which have been considered sufficient to justify the rule that no valid act can be done by an agent acting for a deceased person, though no notice of the death of the principal has reached the parties at the time of the transaction.

"Suppose A., who lives in Milwaukee, does the following acts on the first day of May:—

"I. Executes his promissory note to B., due one year after date.

"II. Executes his last will and testament in proper form, by the

CONTRACTS WITH AGENTS OF UNDISCLOSED
PRINCIPALS.

PATERSON v. GANDASEQUI.

[15 East, 62; 2 Smith's Ld. Cas. 349.]

Gandasequi, a respectable and enterprising Spanish merchant, made up his mind that the foreign market could do with some silks and satins. He accordingly set sail for England, and, on reaching London, went to Larrazabal & Co., certain agents in the city, and commissioned them to buy a quantity of goods for

terms of which his property is left mainly to strangers, and his natural heirs, though deserving, are left with but a pittance.

"III. Gives C. and D., who are his agents at New York, each written authority to purchase certain goods in his name.

"On May 2d he writes to C. not to buy any goods. The next day, May 3rd, A. is accidentally killed.

"Let us see how far the law respects his wishes and compels his representatives to fulfil the obligations he has incurred. Of course his representatives must pay the note, though given in *his name*, and therefore the promise of a dead man. In this case the law implies an agreement on his part that his representatives shall be bound by his contract, and gives effect to that agreement. His wishes as set forth in the will are respected and enforced by the law, though they are the wishes of a dead man, a man who can no longer act, and though they do great injustice to those who should rightfully enjoy his property.

"On May 3rd, C. and D. receive A.'s letters, written May 1st, and each purchases goods according to his instructions, C. purchasing immediately before, and D. immediately after the death of A. Each agent ships the goods bought by him to Milwaukee, consigned to A. The goods are subsequently destroyed on the road by the 'act of God.' The parties of whom the goods were

him. Larr. & Co. (life is too short to repeat the whole name) proceeded to execute the commission, and asked Paterson & Co., a great hosiery firm, to send certain specified articles, with terms and prices. Now, Paterson & Co. knew Larr. & Co., and had perfect confidence in them, but Gandasequi they did not know, and had no confidence in. Therefore, though they sent the goods and though they knew perfectly well that they were really for Gandasequi, and that Larr. & Co. were merely his agents in the matter, yet for all that they booked the goods as sold to Larr. & Co. This was unfortunate, because it happened that Gandasequi was really a more substantial person than his agents, who shortly afterwards went to financial smash. Paterson was not disposed to be content with the fraction of his debt, which, as a creditor in bank-

purchased take steps to recover the purchase-money of the representatives of A. Now, the authority of C. to purchase goods was, in fact, rescinded before they were brought, by the second letter of A. The law, however, very properly protects those who deal with an agent without notice that his authority has been revoked, and the fact that A. had done all in his power to revoke the order he had previously made, and that such order was absolutely rescinded, would not enable the representatives of A. to avoid the liability he thus assumed. But in the case of D., *whose authority A. never attempted or intended to revoke*, the law holds, that the vendor of the goods cannot recover, simply because the party in whose name the contract was made, was not living at that time. In both cases, the act, *by virtue of which each agent was empowered to buy, was the act of a living principal*. In the case of C. the principal does all in his power to prevent the agent from acting; in the case of D. he desires the agent to act, and does nothing to prevent him. The law interposes a technical rule which entirely defeats his intentions, and in effect places upon one of the innocent vendors the burden of paying a heavy insurance on the life of A. without receiving any consideration therefor."

ruptey, he might have got from Larr. & Co., and, with the laudable object of getting the whole of his money, sued Gandasequi. But it was held that, if the seller of goods knows that the person he deals with is only an agent, *and knows also who his principal is*, and in spite of that knowledge chooses to give the credit to the agent, he must stand by his choice, and cannot sue the principal. “I have generally understood,” said BAILEY, J., “that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot, therefore, afterwards sue the principal.”

THOMSON v. DAVENPORT.

[9 Barn. & Cress. 78; 2 Smith's Ld. Cas. 358.]

A person named McKune carried on at Liverpool the business—whatever it may be—of a “general Scotch merchant.” This gentlemen one day received a letter from some customers of his in the land of Burns, to the following effect:—

DUMFRIES, March 29, 1823.

DEAR SIR: Annexed is a list of goods which you will please procure and ship *per* Nancy. Memorandum of goods to be shipped. Twelve crates of Stafford-

shire ware crown window glass, ten square boxes, etc.,
etc. Yours, etc.,

THOMSON & Co.

On receiving this letter McKune went straight to the shop of Davenport & Co., who were glass and earthenware dealers, and had an interview with their head partner. He did not pretend to be buying for himself. He said he had received an order to purchase some goods for some customers in Scotland, *but he did not mention their name*, and the Davenports did not ask for it. They sold about £200 worth of goods and debited McKune, though they knew perfectly well he was only an agent. Then McKune failed without having paid Davenport & Co.

This was an action by Davenport & Co. against McKune's principals, Thomson & Co., who denied their liability on the ground that Davenport & Co. had debited McKune, and could, therefore, look only to him for payment. This view, however, was not adopted by the court, and Thomson & Co. were made to pay, the principle being that, as the name of the real buyer had not been disclosed to them by the agent, the sellers had had no opportunity of writing him down as their debtor.

The chief rules on this subject are — 1. Where you contract with a man whom you know to be an agent, and you know also who his principal is, but, in spite of such knowledge, you give credit to the agent, and to him alone, you are bound by such election, and can not afterwards sue the principal.

2. Where you deal with a man who appears to be a principal, you may, on discovering that he is only an

agent, sue him or his principal at your pleasure. It is necessary, however, that you should make your election between them within a reasonable time.

3. Where you deal with a man who is known to be an agent, but whose principal is undisclosed, you may, on giving evidence that he is himself principal, sue him; otherwise, you must sue his principal.

4. If a person signs a contract in his own name without disclosing the fact that he is only an agent, he is *prima facie* to be deemed the person responsible; and, on action being brought against him on the contract, he cannot turn round and shuffle off his liability by saying that he was only somebody else's agent. Parol evidence to prove such a thing would not be admitted, and if he gets out of the scrape at all, it will be because it is quite clear from the rest of the document that he did not mean to bind himself personally. And, indeed (as we shall see in the next case), the person who has signed a contract in his own name may still be liable, although in the body of the contract he has expressly declared himself to be an agent.

STONE v. WOOD.

[7 Cow. 453; 17 Am. Dec. 529.]

Captain Stone, part owner and master of the good ship George, and Timo N. Wood entered into a contract under seal, the provisions of which are not rele-

vant to this history. It is enough to say that the contract described Wood "as agent of J. & R. Raymond," and referred to him throughout "as agent," closing with an agreement by Wood "as agent," to pay a certain sum to the captain on certain conditions. These conditions being performed, the captain sued for the money, to which Wood replied that J. & R. Raymond were the persons to whom he ought to look. But the captain did not see it in this light, and neither did the Supreme Court of New York. They said that an agent signing a contract in his own name is personally bound thereon, even though he is described in it as an agent. The words "as agent," are a mere description of the person.

SET-OFF AGAINST PRINCIPAL.

GEORGE v. CLAGETT.

[7 Term Rep. 359; 2 Smith's Ld. Cas. 185.]

Messrs. Rich & Heapy carried on business in woollen cloths. For the purposes of their riches heaping they not only carried on business on their own account, but acted also as factors for other people. A factor, it should be remarked, differs from an ordinary agent in having the possession of the goods of his principal which he sells. As Rich & Heapy carried on all their business at the same warehouse, it would not be ob-

vious when they were acting as principals and when as agents. At the time of our story, Messrs. Rich & Heapy happened to have in their possession as factors a large quantity of goods belonging to Mr. George, a clothier of Frome, which goods were in their warehouse along with goods belonging to themselves. It happened just then that Messrs. Clagett were in want of such goods. They held a bill of exchange for £1200, accepted by Rich & Heapy, and as they saw no particular likelihood of getting paid, they thought it would not be a bad plan to buy goods from them on credit, and deduct the amount of the bill from the purchase-money. In pursuance of this plan, Messrs. Rich & Heapy sold them a quantity of goods; making out a bill of parcels for the whole in their own names, and Messrs. Clagett fully believed that they were dealing with principals. Messrs. Rich & Heapy took the goods out of one general mass in their warehouse, so that a large portion of them really belonged to the clothier of Frome, the unfortunate Mr. George.

This was an action by that gentleman against Messrs. Clagett for the price of the portion of the goods which belonged to him, and which he said Messrs. Rich & Heapy had sold as his agents. Messrs. Clagett said they did not know that Rich & Heapy were his agents or anybody else's agents, and claimed to have the same right of set-off (that is to say, of deducting the above-mentioned debt) which they would have had against Messrs. Rich & Heapy. In this contention they were successful.¹

¹ "In all these cases of set-off," says an eminent judge in a later case, "the law endeavors to meet the real honesty and justice of the case. Where goods are placed in the hands of a factor for

*AGENT EXCEEDING AUTHORITY LIABLE IN
CONTRACT.*

COLLEN v. WRIGHT.

[7 El. & Bl. 301; 8 Id. 647.]

Mr. Wright was the land agent of a gentleman named Dunn Gardner, and as such made an agreement with a Mr. Collen for the lease to him for twelve and a-half years of a farm of Dunn Gardner's. On the strength of this agreement Collen entered on the enjoyment of the farm; but he soon found that there was a serious difficulty in the way. Mr. Dunn Gardner refused to execute any such lease, saying that he had never authorized Mr. Wright to agree for a lease for so long a term; and this proved to be the fact. The disappointed farmer brought an action against the executors of the agent who had led him wrong, and the main question was whether Wright's assuming to act as Dunn Gardner's agent to grant the lease

sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller." These words put the rule and its reason very clearly. "But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case, there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal." *Fish v. Kempton*, 7 C. B.

amounted to a *contract* on his part that he had such authority. This was the view adopted, so that Wright's executors became liable to Collen. "I am of opinion," said WILLES, J., delivering the judgment of the Court of Exchequer Chamber, "that a person who induces another to contract with him as the agent of a third party, by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts, for any damages which he may sustain by reason of the assertion of authority being untrue. This is not the case of a bare misstatement by a person not bound by any duty to give information. The fact that the professed agent honestly thinks that he has authority affects the moral character of his act; but his moral innocence, so far as the person whom he has induced to contract is concerned, in no way aids such person or alleviates the inconvenience and damage which he sustains. The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another impliedly, if not expressly, undertakes to or promises the person who enters into such contract upon the faith of the professed agent being duly authorized, that the authority which he professes to have does in point of fact exist. The fact of entering into the transaction with the professed agent as such is good consideration for the promise."

PARTNERSHIP LIABILITY.

WAUGH v. CARVER.

[2 H. Black. 235; 1 Smith's Ld. Cas. 968.]

In February, 1790, Erasmus Carver and William Carver, ship-agents, of Southampton, of the one part, and Archibald Giesler, ship-agent, of Plymouth, of the other part, entered into a rather wide-awake agreement for their mutual benefit. By the terms of this agreement Giesler was to remove from Plymouth and settle at Cowes. There he was to establish a house on his own account, which the Carvers were to puff. Giesler, on the other hand, was to endeavor to persuade all the ship-masters putting into Portsmouth to employ the Carvers. Arrangements were made for sharing in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them. It was also expressly provided that neither of the parties to the agreement should be answerable for the acts or losses of the other, but each for his own. Accordingly, Giesler left Plymouth and came to Cowes, and in the course of carrying on his business there he incurred a certain debt to the plaintiff in this action, who now sought to make the Carvers liable on the ground that the agreement made them partners with Giesler and responsible for his debts.

It was held, in spite of the clause providing that

each should be responsible for his own losses, that the agreement did make the Carvers partners, for: —

1. He who takes the profits of a partnership must of necessity be made liable for the losses.

(The student, however, must look at the next case before taking this proposition for gospel.)

2. He who lends his name to a partnership becomes, as against all the rest of the world, a partner.

COX v. HICKMAN.

[8 H. L. Cas. 268.]

Messrs. Smith & Co., iron-merchants, becoming insolvent, a deed of arrangement was executed between them and their creditors. By this deed Smith & Co. assigned all their property to five trustees to carry on the business under the name of the Stanton Iron Company. The trustees were to manage the works as they thought fit, and to execute all contracts and instruments in carrying on the business. Amongst the creditors were two gentlemen who afterwards blossomed into the defendants in this action. They subscribed and executed the deed, and were both named as trustees. One of them never acted at all; the other acted for six weeks and then resigned. The other trustees, however, did act, and did the best they could for the business. In the carrying on of the business the plaintiff supplied the company with a quantity of iron-ore, and one of the trustees accepted

bills of exchange in the name of the company for the price of it.

The question was whether the trustees were agents for the defendants to accept the bills, and it was held that they were *not*; on the ground that the persons for whose benefit the business was carried on were not the creditors, but Messrs. Smith & Co. The real test of partnership liability, the judges said, was *not* participation in the profits, but whether the trade was carried on by persons acting as the *agents* of the persons sought to be made liable.¹

¹ Persons may be partners as regards the world at large, although they are not partners as between themselves. If a man holds himself out as a partner he is liable to a person who, for that reason, gives credit to the firm. If it were not so, there would be even more imposition in business transactions than there already is. The law does not prescribe any particular acts which shall constitute a "holding out:" evidence may be given of anything the defendant has done which would induce others to believe that he was a partner, such acts having the effect of an estoppel by conduct. As to the other point of these cases, it was for a long time thought that if it could be proved that the defendant *shared the profits* he was thereby proved to be a partner. The effect of the case of *Cox v. Hickman* is to destroy this doctrine; and the law now is that, though community in the profits is *strong* evidence of partnership, it is not *conclusive* evidence. There must always be an examination into the *intention* of the contracting parties.

X. — NEGOTIABLE PAPER.

THE REQUISITES OF A PROMISSORY NOTE.

KELLEY v. HEMMINGWAY.

[13 Ill. 11; Big. Ld. Cas. Bills & Notes 10.]

Hemmingway sued David Kelley on the following instrument:—

“CASTLETON, April, 27, 1844.

“Due Henry D. Kelley, \$53 when he is twenty-one years old, with interest.

“DAVID KELLEY.”

Which Henry D. Kelley had assigned to him by an indorsement in writing. The defendant pleaded that this was not a promissory note, which was a very vital question, because, if it were not a promissory note it was not assignable by indorsement, and Hemmingway had no right to bring an action on it in his own name. The court held the plea good, on the ground that to constitute a promissory note the money must be payable certainly, and not dependent on any contingency either as to event, the fund out of which payment is to be made, or the parties by or to whom payment is to be made. A promise to pay a sum of

money when a particular person is married is not a promissory note — he may never be married. So of a promise to pay when a particular ship returns from sea — it may never return. Here the payment was to be made when Henry attained his majority, but that was an event that might never happen; it was not certain, but simply contingent on his living that long. The fact that he did live till he was twenty-one made no difference. It was not a good promissory note when made, and it could not become so *ex post facto*. If the event was sure to take place it would not have mattered how long a time elapsed. Therefore, if the instrument had been payable at Henry's death, it would have been a good promissory note, for if there is one thing that is certain it is death.

TITLE TO BANK NOTES.

MILLER v. RACE.

[1 Burr. 452; 1 Smith's Ld. Cas. 597.]

On a dark December night about the middle of the last century, the mail from London to the west was attacked by highwaymen. In reply to the usual question, most of the passengers meekly remarked that, on the whole, they valued their lives more than their money, and the knights of the road got away

with a fair bagful. Amongst other things taken was a bank-note for £21 10s., which a Mr. Finney, of London, was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney, who rushed off in wild haste to the bank and stopped payment of the note. Not many days after the plaintiff, who had come by the note quite honestly, and had given value for it, presented it at the bank; but Mr. Race, one of the bank clerks, not only refused to cash it, but even to hand it back. Miller, therefore, sued him. When the case came before the Court of King's Bench, the defendant's counsel made such an ingenious argument that, though Chief Justice MANSEFIELD had no doubt that Mr. Miller ought to recover, he thought it proper to look into the case, and deferred rendering judgment for a week. But at the end of the week the ingenious lawyer was floored. The court was unanimously of opinion that property in a bank-note passes like cash by delivery, and a party taking one *bona fide* and for value, is entitled to retain it as against a person from whom it has been stolen.

WHO IS A "*HOLDER FOR VALUE*."

SWIFT v. TYSON.

[16 Pet. 1; Big. Ld. Cas. Bills & Notes, 486.]

Swift held Norton & Keith's note. They on the other hand had a bill of exchange accepted by Tyson,

and with this they paid their note to Swift. It is doubtful if Tyson would ever have been compelled to pay the amount of this bill to Norton & Keith, for they had induced him to accept it by a lot of false and fraudulent representations about some lands in Maine, to which they had no title; but Swift knew nothing about these frauds, and he took the bill of exchange before it was due. But this did not console Tyson, who when Swift sued him on it, pleaded the rascality of Norton & Keith. But the Supreme Court of the United States decided the case for the plaintiff. "There is no doubt," said Judge STORY, in one of the ablest judgments of that great jurist, "that a *bona fide* holder of a negotiable instrument for a valuable consideration without any notice of facts which impeach its validity as between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. This is a doctrine so long and so well established, and so essential to the security of negotiable paper that it is laid up among the fundamentals of the law, and requires no authority or reasoning to be now brought in its support." The question then was whether a pre-existing debt was a sufficient consideration to shut out the equities of the original parties under this rule. The court held that it was, and that Swift's title was not affected by what had taken place between Tyson and Norton & Keith.¹

It is necessary to say here that the question decided in this case is one of those questions upon which entirely contrary views

NOTICE OF DISHONOR, WHEN NECESSARY.

BICKERDIKE v. BOLLMAN.

[1 Term Rep. 405; 2 Smith's Ld. Cas. 54.]

The bottom facts of this case, (the narrative of which is too complicated to be worth detailing) are as follows: Spendfast being hard up for money, and knowing the weak good-nature of his friend Lighthead, asks him to accept a bill of exchange for him, assuring him that he will never be called on to pay it, and that it is really only a formality. Lighthead consents, and though he gets no consideration whatever for it, accepts a bill drawn on him by Spendfast. The bill finally gets into the hands of Thriftman as holder, and he presents it to Lighthead for payment. Lighthead, of course, dishonors the bill, and uses strong language. Such being the state of the parties, *Bickerdike v. Bollman* decides that Thriftman, the holder, can sue Spendfast, the drawer, without having previously given him notice that Lighthead, the acceptor, has dishonored the bill, the reason being that the drawer never had any effects in the hands of the drawee, and therefore *could not lose anything by notice not being*

are held by different courts. In New York and a few States which follow the New York rule, *Swift v. Tyson* is not regarded as correct law on what constitutes a holding for value, while in the Federal courts, and in most of the State courts, the doctrine of *Swift v. Tyson* is affirmed and followed. See Big. Ld. Cas. Bills & Notes, 497, *et seq.*

given him. "The law requires notice to be given," said BULLER, J., "for this reason, viz.: because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But if he have no effects in the other's hands then he cannot be injured for want of notice."

Bickerdike v. Bollman is still recognized both in America and England as the leading case on this subject. Later adjudications, however, without attempting to overrule it, do not make the right to notice depend upon the fact that the drawee had at the maturity of the bill, funds in his hands of the drawer, adequate to its payment. On the contrary the criterion is: had the drawer *reasonable grounds* to expect that the bill would be honored?¹

UNAUTHORIZED ALTERATIONS VITIATE THE INSTRUMENT.

MASTER v. MILLER.

[4 Term Rep. 320; 2 H. Black. 140; 1 Smith's Ld. Cas. 935.]

We are not in a position to state whether the Mr. Miller who was defendant in this action was the same

¹ See *Hopkirk v. Page*, 2 Brock. 20; Big. Ld. Cas. Bill & Notes, 110.

Mr. Miller who took the bank-note from the robber, and had a passage of arms with Mr. Race, of the bank of England. If so, he is one of the most fortunate litigants of whom there is any record. In the former case, it will be remembered, he was a plaintiff, suing on a stolen bank-note. He now appears in the humbler capacity of defendant, having accepted a bill of exchange, and resisting payment, on the ground that it has been altered since acceptance. It isn't the same bill, he says, and he won't have anything to do with it.

The history of the transaction is this. On March 26, 1788, Peel & Co., of Manchester, drew a bill for £1,000 on Miller, payable three months after date to Wilkinson & Cooke. This bill they delivered to Wilkinson & Cooke, and Miller afterwards accepted it. Wilkinson & Cooke then indorsed it for value to the plaintiff. But, before doing so, they quietly made one or two little alterations, with the object of improving the document. March 26th, they changed into March 20th; and they stuck June 23rd at the top to indicate that the bill would become due on that day. These alterations, being to accelerate payment and unauthorized, were held to vitiate the instrument. "When it is admitted," said Chief Justice EYRE, "that the alteration of a deed would vitiate it, the point seems to me to be concluded. * * * If courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cipher in a bill for £100, by which the sum might be changed to £1,000, and the holder having failed in attempting to recover the £1,000, might afterwards take his chance of recovering the £100 as the bill originally stood. But such a proceeding would be intolerable."

*NEGLIGENCE IN DRAWING CHECK.***YOUNG v. GROTE.**

[4 Bing. 253.]

Mr. Young was a rash but liberal husband. When he went away from home he used to leave blank checks signed for Mrs. Young to fill up according to her necessities. On one of these occasions she requested her husband's clerk to fill out a check for the sum of £50 and 2s. The clerk did so, writing the "fifty" with a small letter in the middle of the line, and putting the figures 50, 2s a good distance to the right of the printed £. He showed it to her, and she told him to go and draw the money from the bank. He went; but he stopped long enough on his way to insert at the beginning of the line in which the word "fifty" was written, the words "three hundred and" and he deftly placed the figure 3 between the £, and the 50. He had now a check for £350 2s, which the bank paid without suspicion, and £300 of which he pocketed. Then Mr. Young tried to throw the loss on the bank but he did not succeed, for this was the judgment of the court: "A banker who pays a forged check is in general bound to pay the amount again to his customer, because he pays without authority, and it is his duty to be acquainted with his customer's handwriting. * * * Yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. * * * Here the

blame was all on one side, and Young must suffer for his own negligence." Chief Justice BEST suggested two maxims which, if Mr Young had only known in time, would have saved him a good many hundred dollars. First, always write your checks well to the left side; second, never let your wife have anything to do with your check book.

STOPPAGE IN TRANSITU.

LICKBARROW v. MASON.

[2 Term Rep. 63; 1 Smith's Ld. Cas. 849.]

The originator of this litigation was one Freeman, of Rotterdam, who had the audacity to become bankrupt and confound the transactions of a great many honest people. The *dramatis personæ* are somewhat numerous, but the student will probably find the following account reasonably clear and correct.

Freeman sent an order to Messrs. Turings, of Middleburg, to ship a quantity of corn to Liverpool. This order Messrs. Turings were rash enough to execute; for they then considered Freeman to be, if not "the richest merchant in Rotterdam," at all events, a safe and solvent person. On July 22, 1786, Messrs. Turings put the corn on board the ship Endeavour, whereof the

master was a Mr. Holmes. It is the duty of a master when he sets out on a voyage like this to sign bills of lading, by way of acknowledging that he has got the goods on board. Holmes signed four of these bills of lading (usually, it may be remarked, only three are signed); and of the four, one he pocketed, two were indorsed in blank by Turings & Co. and sent to Freeman with an invoice of the goods shipped, and the fourth was retained by Messrs. Turings.

The sound ship, Endeavour, had not set sail very long when tidings came to the ears of the Turings that Freeman had become bankrupt. Rising to the occasion, they immediately sent off the bill of lading that remained in their custody to Messrs. Mason & Co., of Liverpool, with a special indorsement to deliver the corn to them for Messrs. Turings' benefit. Pursuant to this special indorsement Mr. Holmes, when he arrived at Liverpool, delivered his cargo to the Masons. In the meantime, however, and before he became bankrupt, Freeman had sent his two bills of lading to Messrs. Lickbarrow duly negotiated for a valuable consideration. Messrs. Lickbarrow, therefore, were anything but pleased to find that Mason & Co. had got hold of the corn, and they brought this action to try and make them give it up. In this they were successful. Judgment was given for the plaintiffs, on the ground that a *bona fide* assignment of the bills of lading defeats the vendor's right to stop *in transitu*.¹

¹ The first rule laid down in this case is to this effect: —

When a man becomes bankrupt his goods are divided amongst his creditors, nobody getting the full amount that is due to him, but everybody getting a proportion of it. Thus, the person who has most recently been rash enough to intrust the trader with goods on

STATUTE OF LIMITATIONS.

WHITCOMB v. WHITING.

[Dougl. 652; 1 Smith's Ld. Cas. 703.]

Whiting and Jones made a joint and several promissory note, which in the course of time came into the hands of the plaintiff. Eight or ten years after the day on which it was made, the plaintiff sued Whiting, who had long ago forgotten his little undertaking.

credit is the most to be pitied, for what was yesterday all his own, is to-day part of the general fund from which each creditor derives the proportion of his debt. To prevent this injustice of one man's goods being used to pay another man's debts, the doctrine of *stoppage in transitu* is introduced. Therefore, although the vendor has sent off his goods, and parted with the property in them, to the vendee on a credit sale, he may, nevertheless, on hearing of that gentleman's bankruptcy or general inability to pay his debts, stop the goods and retake possession of them at any time while they are on their journey to him, and have not come into his actual possession. The right to stop is personal to the vendor or consignor. It cannot, for example, be exercised by a surety for the price of the goods. But the vendor may, at any time before the *transitus* has ended, ratify the act of a stranger who stops the goods. The great question in most *stoppage in transitu* cases is, was the journey at an end or not? The goods are *on the journey* as long as they are in the hands of the carrier *as such*; but the carrier may hold them as bailee for the vendee, as when the latter pays him a rent for warehousing them.

The second rule in this case is, that if, while the goods are *in transitu*, the vendee indorses the bill of lading (as Freeman did) to a person who takes it in the ordinary way of business and in perfect good faith, the vendor's right to stop is at an end. Shirley Ld. Cas. 86.

“Yes,” said Whiting, “that certainly must be my signature, and, now you come to mention it, I *do* remember something about a promissory note. But, you see, the date of that note is more than six years ago; so I have the law on you.” “That’s all very fine, Mr. Whiting,” replied the holder with a chuckle, “but you may be interested to learn that Mr. Jones, the gentleman whose name is with yours on this bit of paper, has paid interest on it within the last six years; and, if I’m not pretty well mistaken, that takes it out of the statute *as against you as well as against him.*”

And so it proved. “Payment by one,” said Lord MANSFIELD, C. J., “is payment for all, the one acting virtually as agent for the rest, and in the same manner an admission by one is an admission by all.” “The defendant,” said WILLES, J., “has had the advantage of the partial payment, and therefore must be bound by it.” In explanation of this last remark it may be suggested that probably all the ten years Jones was punctually paying the interest, so that Whitcomb had no desire to enforce payment of the principal. Then Jones suddenly foundered in the ocean of insolvency, and it became necessary to see whether the other joint contractor was any good.

XI. — LANDLORD AND TENANT.

PAYING RENT FOR DESTROYED PREMISES.

HALLETT v. WYLIE.

[3 Johns. 44; 3 Am. Dec. 457.]

Mr. Hallett leased a house from Mr. Wylie for the term of four years. The lease provided that the rent should be paid quarterly, and that the tenant should pay all taxes and assessments and keep the inside of the house in good order. Mr. Hallett took up his abode in his new quarters, and was very well satisfied until one day in December, barely nine months after he had taken possession, the house was burned down, and he had to rent another one. The landlord waited a year, and then sued Mr. Hallett for four quarters' rent, to which that gentleman replied that he had paid his rent promptly as long as the house stood, but he would be blest if he would pay rent after that time. "No house, no rent," was his motto. This certainly appeared just, but Wylie, who was something of a Scrooge, went to law about it, and, we regret to say, was successful. The court gave the tenant their sympathy and the landlord his money.

"This is a hard case upon the defendant," they said,

“and if the court could, consistently with settled and established principles, relieve him against the payment of the rent in question, we should most willingly do it. But it can not be done without overturning a series of decisions to which this court is bound to conform. We sit here ‘*jus dare*,’ not ‘*jus facere*.’¹ We think it may safely be said that there is not a case in the books where the destruction of the demised premises by fire has been held to excuse the tenant from the payment of the rent on an express covenant; but in every case where a defence on that ground has been attempted, it has failed. The law on this point has, in one of the late cases in England, been considered so fully established that the court would not even hear an argument respecting it.”

MORAL: When you sign a lease of a house, don't forget to have it provide that, in case the building is burned down, or rendered uninhabitable, the rent shall cease to be payable.

NO WARRANTY AS TO CONDITION OF
PREMISES.

CLEVES v. WILLOUGHBY.

[7 Hill, 83.]

The dwelling No. 3, Linden Row, Brooklyn, was for rent, and Mr. Cleves, who was hunting for a house,

¹ “To announce the law, not to manufacture it.”

leased it for five years at a yearly rent of \$300, payable quarterly. He was in such a hurry to get them that he was not particular to examine the premises. After the lease was signed and he was prepared to move in, he found that it was not what one would wish for a residence. The house was in horribly bad repair, the cistern leaked, the cellars were filthy and foul—in fact it was not a place to take a family into at all. Mr. Cleves suggested to the landlord that, unless he would repair and clean it up, he would not move in. This the landlord refused to do, so Mr. Cleves rented and occupied another house. At the end of three months there came a bill for a quarter's rent of No. 3, Linden Row, which Mr. Cleves, very naturally, refused to pay. Then the case came into court, and Mr. Cleves' only plea was that the house was unfit for occupation. But the court refused to listen to it. They held that there was no implied warranty on the part of the lessor of a dwelling-house, that it is fit for habitation. "It is quite unnecessary," said BEARDSLEY, J., "to look at the common-law doctrine as to implied covenants and warranties, or its modification by statute. That doctrine has reference to the *title* and not to the *quality* or *condition* of the property. The maxim *caveat emptor* (let the purchaser beware) applies to the transfer of all property, real, personal and mixed, and the purchaser takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject."

EXCEPT IT IS A FURNISHED HOUSE.

SMITH v. MARRABLE.

[11 Mee. & W. 5.]

Brighton is a fashionable English watering-place, and Sir Thomas Marrable, who wished to spend the season there with his family, rented a furnished house of Mr. John Smith, for a certain term. The student will note that it was a *furnished* house he rented. On the 16th of September the Marrable family moved in. Three days later Mrs. John Smith received the following billet:—

“5 BRUNSWICK PLACE, September 19, 1842.

“Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week’s rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain.”

The landlord sent a man to drive the bugs out, but there were too many for him and the family did leave as threatened. This was Mr. John Smith’s action for the rent under his agreement with Sir Thomas. The jury having found that the bugs were the real cause of the moving out, the Court of Exchequer decided that they did the proper thing and Mr. John Smith was defeated. “A man who lets a ready furnished house,” said Lord ABINGER, C. J., “does so under the implied condition or obligation—call it what you

will — that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact, unknown, perhaps, to the landlord, that lodgers had previously quitted the house in consequence of having ascertained that a person had recently died in it of plague or scarlet fever, would not the law imply that he ought not to stay in it? I entertain no doubt whatever on the subject, and think the defendant was fully justified in leaving these premises as he did; indeed, I only wonder that he remained so long, and gave the landlord so much opportunity of remedying the evil.”¹

*EFFECT ON TENANT OF MORTGAGE BY LAND-
LORD.*

KEECH v. HALL.

[1 Dougl. 21; 1 Smith's Ld. Cas. 654.]

The owner of a warehouse in the city of London, mortgaged it to Mr. Keech, but remained in possession. Soon afterwards, without saying a word to Keech on the subject, he leased it for seven years to Hall.

¹ The principle of this case was expressly affirmed in the late case of *Wilson v. Finch Hatton*, 2 Exch. Div. 336, where the tenant of a furnished house was held to be justified in leaving on account of defective drainage. And see *Dutton v. Gerrich*, 9 Cush. 89.

Keech was very indignant at this. He said the mortgagor had exceeded his rights, having no business to do such a thing without consulting him, and that Hall was no better than a trespasser, and could be ejected without notice. And the judges coincided with his view of the matter. At first sight the tender-hearted student may think this a little rough on Hall ; but it is not really so ; for if the man had taken the trouble to make proper inquiry he would soon have discovered that the person he was dealing with was only a mortgagor, and therefore that it would be a risky thing to take a lease from him.

MOSS v. GALLIMORE.

[1 Dougl. 279; 1 Smith's Ld. Cas. 689.]

Mr. Harrison began the year 1772 by letting a house to Moss for twenty years at the rent of £40 a year. Times were bad with Mr. Harrison, and in May of the same year he mortgaged the property to a Mrs. Gallimore, a nice old lady, who wanted eligible security for the little fortune which her late husband had left her. Moss was not in the least affected by this mortgage of the reversion. He went on quietly living in the house, and paid Harrison his rent pretty regularly up to November, 1778, when he was £28 behindhand. At that time, Harrison, having sunk deeper and deeper into the mire, became bankrupt, being at the

time indebted to Mrs. Gallimore for interest on the mortgage in a sum greater than £28. Mrs. Gallimore gave Moss notice of her being mortgagee, and told him to pay to her the £28 which he unquestionably owed to somebody. Moss showed no disposition to yield to this demand, and finally the old lady made a raid upon his chairs, tables, grandfather's clocks, etc. This distraint Moss considered a trespass, and brought this action accordingly. It was held, however, that the worthy Mrs. Gallimore was quite justified in distraining, for a mortgagee, after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice as well as to what accrues afterwards, and he may distrain for it after such notice.

USAGES AND CUSTOMS.

WIGGLESWORTH v. DALLISON.

[Dougl. 201; 1 Smith's Ld. Cas. 900; Lawson, Us. & C. 169.]

Wigglesworth was, as his bucolic name alone might show, a farmer. By lease dated March 2, 1753, one of the Dallison family let him have a field in Lincolnshire for twenty-one years. In the last year of his tenancy, though he knew that he had to give up the land almost

immediately, he sowed his field with corn. In doing what might seem at first sight a rash and improvident act, Mr. Wigglesworth was relying on a certain local custom, which entitled an outgoing tenant of lands to his way-going crop, that is, to the corn left standing and growing at the expiration of the lease. Dallison's answer to this claim was that, if any such custom existed at all, it had no application to the present case where the terms between landlord and tenant had been carefully drawn up in a lease by deed, and no mention made therein of any custom. The court, however, decided in favor of the custom, Lord MANSFIELD remarking that, while it was just and reasonable and for the benefit of agriculture that he who sows shall reap, it did not alter or contradict the agreement in the lease, but only superadded a right.

LEASES FOR MORE THAN THREE YEARS.¹

RIGGE v. BELL.

[5 Term Rep. 471; 2 Smith's Ld. Cas. 177.]

By parol merely, Rigge let a farm in Yorkshire to

¹ Our friend, the Statute of Frauds, comes to the front again to regulate dealings in land as well as in "goods, wares, and merchandise." By the first section of that important law, it was enacted that (with the exception of leases for a term not exceeding three years) all leases of lands, tenements and hereditaments not put in writing and signed by the parties or their agents, should have only the force and effect of leases at will.

Bell for seven years, and Bell entered and paid rent. But the tenant did not give satisfaction, and Rigge determined to get rid of him. By the terms of the agreement Bell was to go out at Candlemas; but Rigge's view was, as the lease, being for more than three years, and yet not in writing, as the Statute of Frauds required, operated merely as a tenancy at will, he could make the man quit when he pleased, and was not bound by the terms they had agreed on. In this view he found himself mistaken, for it was held, that "though the agreement be void by the Statute of Frauds as to the *duration* of the lease, it *must regulate the terms on which the tenancy subsists in other respects*, as to the rent, the time of the year when the tenant is to quit," etc.

CLAYTON v. BLAKEY.

[8 Term Rep. 3; 2 Smith's Ld. Cas. 180.]

Also by parol merely, Mr. Clayton let Blakey some land for twenty-one years, and Blakey entered and paid rent. Two or three years afterwards his landlord gave him notice to quit, and, as he treated such notice with supreme contempt, sued him for double rent for holding over. To this claim Blakey raised the somewhat cool defence that (by virtue of sect. 1 of the Statute of Frauds, which directs that any lease for more than three years, not reduced into writing, shall

operate only as a tenancy at will) he was only a tenant at will, and ought to have been so described in the plaintiff's declaration. It was held, however, that Blakey was not a tenant at will, but a yearly tenant, and therefore the plaintiff's pleading was good enough to hit him.

This decision seems, at first sight, rather extraordinary. The Statute of Frauds distinctly says, that all leases by parol for more than three years, shall be tenancies at will only. The decision intervenes and says: "No, they shall be yearly tenancies," thus putting the tenant in a better position than the statute left him in. The accepted explanation is that the statute's intention was that the estate should be an estate at will *to begin with*, but that when once created, it should be liable, like any other estate at will, to be changed into a tenancy from year to year by payment of rent, or anything showing an intention to create a yearly tenancy. But if there were no circumstances showing such intention, the estate would remain an estate at will.

AGRICULTURAL FIXTURES.

ELWES v. MAWE.

[3 East, 38; 2 Smith's Ld. Cas. 228.]

Toward the close of the last century, Elwes let a farm at Bigby in Lincolnshire to Mawe for twenty-one

years ; and during his tenancy Mawe conceived and carried out various improvements for the more profitable occupation of the land. He built a beast-house, a carpenter's-house, and a pigeon-house, among other things. By-and-by the twenty-one years came to an end, and the time came for Mawe to go. A few days before leaving, he set his laborers to work to pull down the beast-house, and the carpenter's-house, and the pigeon-house and whatever else he had erected, and carted them all away, leaving the premises in just the same nude condition they were when he entered. When Elwes heard of this he was very angry. He said Mawe had no right whatever to take away fixtures, it was flat burglary and so on, and finally he brought an action for waste. There was no doubt that by the old common law whatever a lessee annexed to the freehold during his term, unless it was a trade fixture, became the landlord's when he left, but Mawe's counsel argued that, considering the capital farming required now-a-days, and the elaborate implements employed in the cultivation of the land, agriculture was every bit as much a trade as clock-making or iron-mongering. Moreover, they produced authorities which showed that hot-houses, posts, sheds, colliery-engines, and the like, had in various cases been held to be removable by tenants as being trade erections ; and they defied the plaintiff to show the difference between such things and the things the defendant had set up. All this was very plausible, but the judges came to the conclusion that Mawe had no right to remove his erections. They said it would be a " dangerous innovation " to call agriculture a trade, and that the hot-houses and

the other erections the defendant made so much of, were all more or less connected with trade.

An anonymous modern poet has, in glowing hexameters, described the great trial wherein:—

Elwes, the shrewd, was plaintiff, and Mawe, the thrifty, defendant,
Mawe was lessee from Elwes of lands in the county of Lincoln,
Messuage, out-houses, stables and barn, in the parish of Bigby;
Mawe, the thrifty, looked round him and scanned those premises
wisely,

Full six years he scanned them, beholding the farm's occupation
'Minished in use and worth for want of convenient buildings:
Therefore he laid to his hand, and set up those convenient buildings,
All at his own expense, a carpenter's-shop and a beast-house,
Houses of fuel and carts, and a pump-house, of brick and mortar,
Founded fast in the ground, and tiled, and of brick were the pillars.
So he possessed his farm, and rejoiced in his useful buildings,
He and all men and all beasts of the field in the parish of Bigby.
Time, which men count by moons, but the gods by terms and vaca-
tions,

Stood not nor halted the while, and the lease drew nigh to its
ending.

Therefore, did Mawe, the thrifty, bespeak his own heart and take
counsel,

This way and that revolving the cost and the gain, and the
chances

Weighing, and thus at the last to himself did his heart make
answer:

“Lo, now, I leave these lands, and shall be to this farm as a
stranger;

Soothly it little shall profit me then if the houses I builded
All at mine own expense, the carpenter's-shop and the beast-house,
Houses of fuel and carts, and the pump-house, of brick and mortar,
Joy to all men and all beasts of the field in the parish of Bigby,
Stand there after my time, and be left a possession to Elwes:
Nay, but I surely will move their foundations, digging around
them,

Raze their walls and their stuff, the goodly bricks and the mortar,
Keep for a gain to myself and leave the land as I found it.”

So then in all things he did in such wise as his heart had coun-
selled,

Razed those walls, and moved the foundations, digging around them,

Carted away the stuff for himself, the bricks and the mortar.

Elwes, the shrewd, sat aloft and beheld from his height of reversion

These things wrought, and, beholding, his anger was kindled within him,

Anger that moved him to deeds of might and to Lincoln assizes.

There he declared against Mawe for his injured estate in reversion, Claiming the buildings his own, their destruction a waste and a trespass.

Great was the case and the point too grave for Lincoln assizes ; After a verdict for Elwes, the case was reserved for the full court. There where the king's own pleas were before his justices holden, Counsel for Elwes and Mawe stood forth and strove with examples, Showing what things in old time were esteemed ingrown to the freehold,

Rooted past lawful removal, what kept their movable nature, Much they debated of wainscot and window, of furnace and oven, Vats of the dyer and cider-mills and boilers and salt pans ;

Also, not least, a new thing, fire-engine, a blessing to coal mines.

Twice in two terms they strove and the court considered its judgment,

Judgment which afterwards, well advised, the chief justice delivered,

Stated the case and the question and spoke their considered opinion ;

No right had the defendant, they held, to remove these buildings, Wisely he showed how the general rule bids cleave to the freehold

Things by the tenant once fixed, and explained the divers exceptions

Suffered in favor of trade, the furnace, the vats, and the boilers,

Also the new fire-engines, the cider-mills and the salt-pans ;

Ever in favor of trade, such exceptions, no mention of farming ;

Further to stretch the exception to mere agricultural buildings,

Not for a certain trade, were great and rash innovation.

Wherefore Elwes, the shrewd, maintained his cause and his verdict,

Had great worship of all men there, and went homeward rejoicing,

Bearing the *postea*, goodly-engrossed, the prize of the battle.¹

¹ Leading Cases Done into English. By an Apprentice of Lincoln's Inn. London, 1876.

COVENANTS THAT "RUN WITH THE LAND."

SPENCER'S CASE.

[5 Coke, 16; 1 Smith's Ld. Cas. 116.]

In the days of Queen Elizabeth there lived a gentleman named Spencer, who, wise in his generation, married a woman with money. Thus crested into a landed proprietor, he let a house and grounds to a member of the great family of Smith for a term of twenty-one years, and in the indenture Smith covenanted to build a brick wall on the lands let to him. Before very long Mr. Smith got tired of his residence, and assigned the demised premises to a Mr. Jones without having made the least attempt at building the brick wall. But Jones could not live there either, and he, in his turn, passed on the place to Clark. Meanwhile nobody had built the wall, and Spencer called on Clark to do it. "I'll see you —," replied Clark, in the most forcible Saxon of the period; "I've nothing to do with it; I never undertook to build any brick walls." "Well, but," said Spencer, "Smith did; and you stand in his shoes." Argument, however, was useless, and Spencer went to law.

The judges had quite "a day" over this brick wall. "And, after many arguments at the bar, the case was excellently argued and debated by the justices at the bench, * * * and many differences were taken and agreed concerning express covenants and cove-

nants in law, and which of them would run with the land, and which of them are collateral and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound, although he be expressly named, and where not." They decided in the end that Clark was *not* bound to build the wall, Smith not having covenanted for his assigns, but *only for himself* as to a subject-matter *not in existence* at the time of the covenant, and they laid down the law on this subject very clearly to this effect: —

A covenant "runs with the land" when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land. Some covenants run with the land, some do not, thus: —

1. Suppose the lessee who makes the covenant omits all mention of his assigns, and the deed speaks only of himself. In that event —

a. If the covenant has to do with *something not in existence* at the time the lease is made the assignee is not bound. This was precisely Spencer's case; the brick wall was "not in existence at the time the lease was made," and has probably not been built yet.

b. But if the covenant has to do something which *is in existence* at the time the lease is made, and *is part of the demised lands*, then the assignee is bound. If, for example, Smith had covenanted to repair the house during the term, Clark would have been liable to perform that covenant. The house was in existence at the time the lease was made, and it was of course part of the demised lands.

2. Now suppose the lessee who makes the covenant *covenants for his assigns* as well as for himself.

a. The assignee is of course liable in case *b* of 1. A mild exercise of *a fortiori* reasoning will show that this is so. If an assignee is bound when he is *not* named, much more is he bound when he *is* named.

b. But the assignee is also bound in case *a* of 1, provided that what is to be done is to be done on the demised premises. Clark, for instance, would have had to build the wall if Smith had covenanted for his assigns.

c. The assignee is not liable when the lessee's covenant is *collateral* to the lands demised. If the lessee covenanted to build a crematory in the next county, very well, let him do it, there is no great harm in a crematory. But such a covenant would not bind his assigns even if the lease said so, for it would have nothing to do with the land demised.

WAIVER OF CONDITION IN LEASE.

DUMPOR'S CASE.

[3 Coke, 119; 1 Smith's Ld. Cas. 85.]

In the tenth year of the reign of Queen Elizabeth the college of Corpus Christi, Oxford, made a lease for years of certain land to a Mr. Bolde, exacting from him a covenant that he would not alien the property

to anybody else without the college's consent. Three years afterwards the college, by deed, gave him permission to alien to anybody he pleased, and soon afterwards Bolde availed himself of this permission and assigned the term to one Tubb. Tubb, after a brief enjoyment of this world's goods, made his will devising the lands to his son, and went over to the majority. The son entered, and also died, but intestate, and administration was granted to a person who assigned the term to the defendant Symms. Thereupon the wrath of the president and scholars of the college of Corpus Christi, in the University of Oxford, was kindled. Bolde had covenanted with them not to assign without leave, and such a covenant, they said, should have been observed by whoever held the lands. Therefore, they entered for the broken condition, and leased to Dumpor for twenty-one years. Dumpor entered, but Symms re-entered, and for doing so Dumpor now brought this action of trespass against him, the college spectator of the tempest from the safe shore. Dumpor did not succeed: the case was decided against him on the ground, that "if the lessors dispense with one alienation, they thereby dispense with all alienations after."

" 'Dumpor's case' always struck me as extraordinary," said Lord ELDON in 1807, "but," he added rather regretfully, "it is the law of the land."¹ "The profession have always wondered at Dumpor's case," said Chief Justice MANSFIELD in 1812, "but it has been law so many centuries that we cannot now reverse it."² Nevertheless, it remained the law of Eng-

¹ *Brummell v. Macpherson*, 14 Ves. 173.

² *Doe v. Bliss*, 4 Taunt. 736.

land until 1860, when Parliament knocked it on the head by enacting that "every such license should, unless otherwise expressed, extend only to the permission actually given." Dumper's case is not, however, to be neglected by the American student, as it has been recognized and followed in this country in many subsequent cases early and late.¹

GOODS PRIVILEGED FROM DISTRESS FOR RENT.

SIMPSON v. HARTOPP.

[Willes, 512; 1 Smith's Ld. Cas. 527.]

John Armstrong was a stocking-weaver, and rented a small cottage of the defendant Hartopp. Early in 1741 he hired a stocking-frame from the plaintiff Simpson, at so much a week, for the purposes of his trade. About the end of the year, as tenants will do, he got behindhand with his rent, and Hartopp, as landlords will do, distrained on him. There was not much for the bailiffs when they came; indeed, so little that there was not enough to satisfy the rent in arrear without carrying off Simpson's stocking-frame. This was done, although "the said John Armstrong's ap-

¹ See Taylor's L. & T., sect. 286; notes to 1 Smith's Ld. Cas. 88.

prentice was then weaving a stocking on the said frame." When he heard of this, the anger of Simpson was kindled, and he brought an action of trover for the stocking-frame, and succeeded in getting it restored to him; for a landlord has no business to distrain on what is *actually in use* at the time.

The general rule is, that all personal chattels found on the premises, whether the goods of the tenant or somebody else, can be distrained for rent. *Simpson v. Hartopp* introduces us to the exceptions:—

1. Some things are *absolutely* privileged from distress; under no circumstances can they be taken. Such things are—

1. Things in the personal use of a man (because the law does not wish to encourage breaches of the peace), as the hatchet with which a man is working, the clothes he is wearing, or the horse he is riding.

2. Fixtures (because damage would be done to the freehold in tearing them away).

3. Things sent to the tenant to be wrought on in the way of his calling; this exemption is for the sake of trade; no one would like his boots to be at the mercy of his cobbler's landlord whenever they required mending. So a horse sent to a farrier's shop cannot be distrained for the rent of the shop, nor yarn sent to a weaver's, nor cloth to a tailor's,¹ nor sacks of corn sent to a mill to be ground, or a market to be sold.

4. Goods delivered to a common carrier or other person to be conveyed for hire.

5. Perishable goods (because such articles cannot be restored *in statu quo ante* distraint; they soon be-

¹ *Hoskins v. Paul*, 4 Halst. 110.

come corrupt and uneatable); and therefore if I am behind in my rent, my landlord cannot carry off my bread, and fruit, and milk.¹

6. Wild animals (*feræ naturæ*, as the law-books call them); because no one has any valuable property in them. Dogs were once considered *feræ naturæ* — one judge went so far as to call them vermin — but they are not now, and when an animal, naturally wild, has discarded its rough manners and settled down to play the humbler *role* of domestic pet — a tame fox or a dancing bear, for instance — it may be distrained as much as a horse or a donkey.

7. Goods in the custody of the law; because already taken in execution, and because a court will not brook interference with property in its custody.²

8. Everything in the houses of ambassadors or other public ministers of a foreign state is by the law of nations exempt, being considered out of the jurisdiction of the country.³

II. Certain other things are privileged *conditionally*. They can be taken, but only when there are not sufficient other goods on the premises to satisfy the landlord's claim. Such things are —

1. The instruments of a man's trade; *e.g.*, a workman's pickaxe, a doctor's stethoscope, a lawyer's "Leading Cases," or a stocking-weaver's frame. It would be contrary to public policy to take the means whereby a man lives. Of course, if the lawyer were actually reading his law-book, or the doctor using his surgical instrument, such things would be *absolutely*

¹ Given *v.* Blann, 3 Blackf. 64.

² Noe *v.* Gibson, 7 Paige, 513.

³ Taylor's L. & T., sect. 596.

privileged, as being in their personal use ; so that there would be no necessity to make them out to be conditionally privileged.

2. Beasts of the plough, and sheep.¹

III. By a variety of statutes in the different States (which the student must consult for himself) other exemptions from distress are made in addition to those at common law. Among these are the necessary tools of a mechanic, household goods to a certain value, and other articles.

¹ Taylor's L. & T., sect. 597.

XII. — INSURANCE.

CONCEALMENT OF MATERIAL FACTS.

CARTER v. BOEHM.

[3 Burr. 1905; 1 Smith's Ld. Cas. 618.]

The governor of Fort Marlborough, in the Island of Sumatra, in the East Indies, came to the conclusion that there was considerable danger of his fort being captured. He wisely, therefore, wrote to his brother in England, and asked him to get the fort insured for a year. The brother accordingly went to Boehm & Co., and that eminent firm insured Fort Marlborough against capture by "a foreign enemy" between October 16th, 1759, and October 16th, 1760. In April, 1760, the fort was captured by the French, and this action was brought to recover the insurance money. The insurers declined to pay, on the ground that certain material facts contained in two letters which the governor had written to his brother in September, 1759, had been concealed from them. In those letters the governor spoke of the weakness of his fort, and the probability of the French attacking it. "The question," said Lord ELLENBOROUGH, in delivering the

judgment of the court, "must always be whether there was under all the circumstances, at the time the policy was underwritten, a fair representation or a concealment, fraudulent if designed, or though not designed, varying materially the object of the policy and changing the risk undertaken to be run." Therefore, it appearing that the fort was little more than a factory, being merely intended for defence against the natives, so that its weakness was an immaterial fact as regarded the French, while the probability of their attacking it was a question which a person in England was in a better position to determine than the governor himself, Boehm & Co. were ordered to pay up.

FIRE INSURANCE—CUSTOMARY USE OF PROHIBITED ARTICLES.

HARPER v. CITY INS. CO.

[1 Bosw. 520; 22 N. Y. 441; Lawson, Us. & C. 157.]

Everybody knows the great printing and publishing house of Harper & Brothers, New York. Many will also remember that about thirty years ago this extensive establishment was almost entirely destroyed by fire. Though the Harper's were well insured the companies did not pay up without some law suits. There

was one policy for \$10,000 in the City Insurance Company of New York which covered books and book materials, stereotype plates, paper, etc., contained in the premises and privileged "for a printing office and bindery." Called on, after the fire, to settle, the officers of the company drew the Messrs. Harper's attention to one of those numerous conditions which, printed in the smallest of type and in the most out of the way place, every insurance policy contains. This condition was in these words: "The company shall not be liable for loss or damage by fire occasioned by camphene or other inflammable liquid." Now, as the fire had originated through the carelessness of a printer in dropping a lighted paper into a pan of fluid camphene which he mistook for water, it looked like a desperate case for the firm. But they, like prudent men, straightway went to see a "good lawyer." They consulted William M. Evarts, and he advised them to bring an action on the policy, which they did. On the trial a number of witnesses testified that camphene was necessary for fine printing, for the purpose of cleansing the rollers of the machines. On this ground the company were ordered to pay up, the principle being that where a certain trade or business is insured, the insurer is presumed to consent that all its customary incidents shall be allowed, though the policy does not permit it and may even, by its printed conditions, forbid it. By insuring the plaintiff's stock with the privilege of a printing office and book bindery, said the court, the use of such materials, including camphene, as were necessary in that business was allowed; otherwise the contract was a delusion and a snare.

*WHO MAY INSURE THE LIFE OF ANOTHER.***CONNECTICUT, ETC., INS. CO. v. SCHAEFER.**

[94 U. S. 457.]

George and Frances had been married a few years when an insurance agent appeared on the scene, and soon demonstrated what a good thing it would be for them to take out a policy in his company on their joint lives, so that if he died she would have \$5,000 to comfort her for her loss, and *vice versa*. But after they had got the policy the course of true love ran anything but smooth. The end of it was that in two short years the judge was called on to cut the hymeneal knot — George and Frances were divorced. Then George married a Frances II. and Frances married a George II. By-and-by George I. died, and Francis I., when she heard the news, unlocked the bureau drawer, took out the policy, and concluded to open a bank account that afternoon, after she had called at the insurance-office for her money.

The insurance manager sat in his counting-house counting out his money. He chuckled to himself as he read over the long list of innocents who had handed over their money for his company to keep. He smiled as he thought how the bump of confidence had been developed in some people, when, enter Frances. The manager pleasantly handed her a chair, mistaking her for an applicant for insurance; but when she produced the old policy on the life of her

first George, his smile departed ; and his look changed to one of blank astonishment, as she asked him if he would be good enough to write her a check for the amount, in order that she might get it in the bank before three o'clock. " Pay you to-day ? " he gasped. " You must be crazy, madam ; I never heard of such a thing. You quite take my breath away, I assure you." " Well, I am sorry if I have made a mistake, but does not the policy say that you will pay me the money 'at his death?' and you know very well that he has been dead nearly a week." " I admit," answered the manager, " that it says 'at his death,' but it really means nothing of the kind. You see, before we can pay you we have to find out whether the man is dead, what he died of, whether the answers he gave about the lives of his grandfathers and grandmothers and uncles and aunts were all correct. Of course, we know that he is dead, but not officially, madam, not officially. All this will take a long time, for I have the best reason for believing that we can establish, by correspondence with parties in Germany, that his maternal granduncle was sixty-nine years and eleven months old when he died, while, according to our deceased friend's statement, he should have been seventy. If this is so, it was a misrepresentation, which, of course, releases us from liability, to say nothing of a report which one of our agents brings that an old acquaintance remembers his falling from a tree when bird's-nesting while a boy — another important fact which he concealed from us. Come back in a couple of years, madam, and we will then be in a position to say whether we will pay you or not." " Swindler," cried Frances, " I'll send my husband to talk to you."

“Calm yourself, madam,” returned the manager; “you can not mean that you have secured another husband in a week.” Then Frances told the manager how she and George had been divorced more than a year before, and that she had married again. As he listened to this, his smile returned, and, raising his eyes, he said slowly: “Before you go, madam, I should like to ask you if you have ever heard of Boldero?” “Boldero,” exclaimed Frances; “who was he, a Chinaman?” “No,” returned the manager, “an Englishman. Listen to his story and then say if you think it worth while coming here again even in two years:

“About seventy-five years ago there lived a great statesman named William Pitt, who was Prime Minister of England, and whose income was never quite up to his expenses. Among his many creditors was one Boldero, a carriage-maker, who had a bill against him for something like £2,500. Seeing small chance of his ever getting his money from either Pitt living, or his estate when he died, Boldero went to the Pelican Insurance Company in London, and took out a policy on the premier’s life for the £2,500. By-and-by Mr. Pitt died, and a grateful country, after depositing his remains in Westminster Abbey, ordered all his debts to be paid from the public purse. Up, then, comes Mr. Boldero, and gets his £2,500 from the government fund. Then he presents his policy at the Pelican office, and the directors refusing to pay him, he brings a suit in the Court of King’s Bench. But there he is worsted, for Lord ELLENBOROUGH, Chief Justice of England, decided that a contract of life insurance is a contract of indemnity, and that, as Boldero had been

paid his debt, he could not recover anything from the company.¹

“So, madam, you must plainly see that by being divorced and marrying again, your interest in the life of your first husband ceased, and, like Boldero, you can’t get any insurance money. Good day.” Frances left the office, and went straight to a lawyer. To him she related the whole case, beginning with the visit of the agent five years before, and ending with her interview with the manager. “He asked me,” said she, “if I had ever heard of Boldero.” “Did he, indeed,” said the man of law, “then go back and ask *him* if he ever heard of Dalby.”²

The last scene is laid within the august portals of the Supreme Court of the United States, where the man of law has safely piloted Frances’ action against the company. The court is delivering its judgment. There is no use, they say, quoting Boldero’s case to us, for as even the great Homer sometimes nods, the great ELLENBOROUGH sometimes made a mistake, and when he decided that Boldero could not recover the £2,500 from the company he made a very big one, indeed. The English judges never liked that decision; so when, fifty years after, one Mr. Dalby sued on a policy on the life of the Duke of Cambridge,² the Court of Exchequer Chamber unanimously overruled Boldero’s case. A man cannot take out an insurance on the life of a total stranger, for the insurance is only valid when he has some interest in the life of the party whom he insures. Any reasonable expectation

¹ *Godsall v. Boldero*, 9 East, 72; 2 Smith’s Ld. Cas. 292.

² *Dalby v. India, etc.*, Life Ass. Co. 15 C. B. 365; 2 Smith’s Ld. Cas. 298.

of pecuniary benefit or advantage from the continued life of another creates a sufficient insurable interest in such life. Thus, a man has an insurable interest in his own life, and in that of his wife and children, a woman in that of her husband, a child in the life of his parent, or a creditor in the life of his debtor. A contract of life insurance is not like that of fire insurance, or marine insurance, a contract of indemnity merely, (this is where ELLENBOROUGH blundered), but it entitles the insured to recover the whole amount without reference to what his real loss is. All that is necessary is that he should have had an insurable interest *at the time the policy was taken out*. The cessation of this interest does not affect the case at all. Frances clearly had an insurable interest at the time the policy was taken out — for George and she were then man and wife — and the subsequent divorce and re-marriage did not alter the case.

So she got her money after waiting five years. But then beneficiaries under life insurance policies have generally to wait longer than that, and usually consider themselves very lucky if they ever get anything at all.

XIII. — BAILMENTS.

THE DIFFERENT KINDS OF BAILMENTS.

COGGS v. BERNARD.

[Ld. Raym. 909; 1 Smith's Ld. Cas. 284.]

Coggs wanted several hogsheds of brandy removed from one cellar to another. Instead of employing a regular porter to do the job, he accepted the gratuitous services of his friend, Bernard, who said he would move them safely and securely. But the amateur did his work so clumsily that one of the casks was staved, and the street streamed with good old brandy. Coggs was angry, and notwithstanding Bernard was to receive nothing for his trouble, successfully maintained an action against him for the spilt liquor.

This is one of the most celebrated cases ever decided by a court, for the elaborate judgment of Chief Justice HOLT contains the first exhaustive and methodical exposition of the law of bailments. A bailment is the delivery of a thing in trust for some special purpose, the person who delivers it being called the bailor, and the person to whom it is delivered the bailee. Lord HOLT divides bailments into six kinds — *depositum*,

mandatum, *commodatum*, *vadium*, *locatio rei*, and *locutio operis faciendi*. These may also be classified: (1) For the benefit of the bailor alone; (2) for the benefit of the bailee alone; (3) for the mutual benefit of the bailor and bailee.

1. Under the first head come *depositum* and *mandatum*.

(a.) *Depositum* — the delivery of goods *to be taken care of* for the bailor without the bailee receiving anything for his trouble: *e.g.*, I ask my friend Brown to hold my watch while I am playing a game of base-ball. Brown is responsible only for *gross* negligence. If he takes a moderate amount of care of my watch, he will not be obliged to give me a new one if it is stolen, or lost, or broken. But, on the other hand, if he has been grossly negligent, he cannot defend himself by showing that he has lost his own things with my watch. At the same time I must exercise a certain amount of care in the selection of my depositary. If I were to intrust my watch to an idiot or a little girl, no amount of gross negligence on their part would give me a remedy against them. I must bear the consequences of my own stupidity. The depositary, as a rule, must not make use of the things deposited. But if no harm would naturally come from his doing so, he may. Brown, for example, might draw my watch from his pocket to see the time.

(b.) *Mandatum* — the delivery of goods *to be done something with* for the bailor, without the bailee receiving anything for his trouble: *e.g.*, I ask my friend Jones to post a letter for me.

As in *depositum* (and *mandatum* is only a kind of superior *depositum*), the bailee is liable for gross neg-

ligence only. The contract between Mr. Coggs and Mr. Bernard was one of *mandatum*, though it is to be observed that Mr. Bernard laid additional responsibility on his shoulders by undertaking to effect the removal "safely." The rule, however, that a mandatory is responsible for gross negligence only, is to some extent qualified by the maxim *spondes peritiam artis*, that is to say, if your position implies skill you must use it. If I ask a jockey to do me the favor to try my horse, or a surgeon offers, without pay, to set my sprained ankle, they must use the ordinary care of persons of their qualifications. What would not be negligence at all in unskilled persons might be gross negligence in them.

2. Under this head (for the benefit of the bailee alone) comes *commodatum*.

(a.) *Commodatum* — the *lending* of a thing to be returned just as it is: *e.g.*, I lend my gray mare to Jones to ride to the next town on; I don't expect him to return me another gray mare, but the same identical old horse that I lend him. (Note. — If I expected a borrower to return me not the identical things, but similar: *e.g.*, if I lend him half a dozen postage stamps, or \$5, it would not be *commodatum* but *mutuum*.)

Commodatum being a contract in which the only person benefited is the bailee, that gentleman is responsible even for *slight* negligence; the more so as by the fact of borrowing he may be taken to have represented himself to the lender as a fit and proper person to be intrusted with a valuable article. The commodatory must strictly pursue the terms of the loan. If I borrow a horse or a book to ride or to read

myself, I have no business to allow anybody else to ride or read. If the horse is lent for the highway, I must not take it along dangerous bridle paths. The bailee must redeliver the chattel, when the time has expired, just as it was, reasonable wear and tear excepted. He is not responsible, however, if the article perishes by inevitable accident, or by its being stolen from him without any fault of his. The bailor must disclose defects of which he is aware, as for instance, that the gun he lends his friend Brown is more likely than not to burst and blow his hand off.

3. Under the last head (for the mutual benefit of bailor and bailee) come *vadium*, *locatio rei* and *locatio operis*.

(a.) *Vadium* (otherwise known as *pignori acceptum*) — the contract of pawn. We will hope the student is not frequently the bailor here.

The benefit being mutual, the degree of diligence required of the bailee is "ordinary." If in spite of due diligence the chattel is lost while in the pawnee's keeping, he may still sue the pawnor for the amount of his debt. The effect of the contract of pawn is not (like that of a mortgage of personalty) to pass the property in the chattel to the bailee; nor, on the other hand, is it (like that of a lien) merely to give him a hostage, but it gives him such a special property in the thing pawned as enables him, if the pawnor makes default, to sell it and pay himself; the surplus being, of course, handed back to the pawnor. As a rule, the pawnee may not make use of the thing bailed to him. If, however, it is an article which cannot be the worse for the user, — jewellery, for

instance, — he may ; but in such a case he would be responsible for the loss, however it happened. Moreover, if the pawn be of such a nature that the pawnee is put to expense to keep it, *e.g.*, if it be a horse or a cow, the pawnee may make use of it, — riding the horse or milking the cow — as a recompense for the cost of maintenance.

(*b.*) *Locatio rei* — the every-day contract of the hiring of goods.

This being a mutual benefit bailment, the degree of negligence for which the hirer is answerable is ordinary. I hire a horse and buggy from a livery-keeper, and during the course of my drive, the buggy is run into and smashed, or the horse runs away and tears everything to pieces. The law does not make me pay the livery-man for the damage, if I have used ordinary care in driving, that is, if I have driven his horse as I would my own.

(*c.*) *Locatio operis faciendi* — when the bailee is to bestow labor on or about the thing bailed, and to be paid for such labor.

Generally speaking, the rule as to care in this case is the same as in *vadum* or *locatio rei*. I give my coat to a tailor to be mended or my watch to a jeweller for the same purpose. They must use ordinary care in doing it, and of course if their occupation implies skill they must use it, as in case 1 (*b.*) But when a bailee of this kind is a person exercising a public employment — a common-carrier or an inn-keeper, he is required to exercise much greater circumspection. In fact, the law makes him an insurer of my goods, except where the loss arises from the act of God or the public enemy.

LIABILITIES OF INN KEEPERS.

CAYLE'S CASE.

[8 Coke, 32; 1 Smith's Ld. Cas. 194.]

A lated traveller gained his timely inn, and dismounting from his fiery steed bade mine host send it out to pasture. The landlord, accordingly, sent it into a field; but, when its master wished to resume his journey, it was nowhere to be found. The owner now tried to make out that the landlord was responsible. But it was held that he was not, for the horse had been sent into the field at the express desire of the guest; and several other rules as to the liability of inn-keepers this great case established in the law, viz. :

1. If a neighbor, who is no traveller, but simply a friend who is lodging there at his request, has his goods stolen from the inn, the inn-keeper is not liable.

2. An inn-keeper is bound to answer for himself and his family, for his chambers and stables.

3. It is no excuse that he delivered the guest the key of the chamber in which he is lodged, and that he left that chamber door open.

4. Although the guest does not deliver his goods to the inn-keeper to keep, nor acquaint him with them, yet, if they be carried away or stolen, the inn-keeper is liable.

5. The inn-keeper requires his guest to put his goods in a certain place under lock and key, and then he will warrant them, otherwise not; the guest lets them lie

in an outer place where they are taken away. The inn-keeper shall not be charged.

6. The inn-keeper's liability extends to all movable goods.

7. If the guest's servant, or he who comes with him, or he whom he desires to be lodged with him, steals or carries away his goods, the inn-keeper shall not be charged.

8. If the guest be beaten at the inn, the inn-keeper shall not answer for it.

BERKSHIRE WOOLLEN CO. v. PROCTOR.

[7 Cush. 417.]

Russell, the agent of the Berkshire Woollen Company, went to Boston to attend to a law-suit for his principals. He put up at the Marlboro hotel in that city, along with several witnesses that he had brought along with him. Law-suits, as some people know, cost money, and Russell, therefore, besides spare change, had a package containing \$500 in his trunk. He had been at the hotel about three weeks, when he discovered that a thief had come into his room, picked the lock of his trunk and departed with the shekels. The Woollen Company did not like to lose good money in this way, and they immediately instituted a suit against the landlord for the amount. Mine host made several defences. Among other things he said that as Russell

was going to be in Boston several weeks, he had made a special agreement with him to board him at so much a week. "This made him a boarder," he argued, "and an inn-keeper is only an insurer of the property of 'guests.' " But the court held that a traveller who puts up at an inn, and is received as a guest, does not cease to be a guest from the fact that he makes an agreement with the inn-keeper for the price of his board by the week. Beaten from this position, he said that he was quite willing to stand liable for the property of his guests, but that he thought he ought not to pay for what they carried with them belonging to other people. But the court told him that it was an old principle of law, that if a servant is robbed of his master's money or goods, the latter may maintain an action against the inn-keeper in whose house the loss was sustained. These were two knock-downs for the plaintiff, but the defendant came up smiling for a third and final round. "At any rate," he said, "I am only liable for such sums of money as my guests are obliged to carry for their necessary travelling expenses." "No," answered the court, "you are wrong again. The responsibility of the inn-keeper extends to all the movable goods and chattels and moneys of his guest which are placed within the inn." The landlord could fight no longer; he threw up the sponge and paid the judgment.

*RESPONSIBILITY OF CARRIER OF PASSENGERS
FOR DEFECTIVE VEHICLE.*

INGALLS v. BILLS.

[9 Metc. 1; Thomp. Ld. Cas. Carr. Pass. 112.]

Mr. Ingalls was another unfortunate traveller. Riding on the top of a coach which carried passengers between Cambridge and Boston, he was surprised to hear the axle crack, to see one of the hind wheels come off and to feel the vehicle settle down on one side. Without waiting for anything more, he made a jump to the pavement, but not being able to land with the ability of a trapeze performer, he broke his arm. A broken arm is no joke and Mr. Ingalls determined to make the coach proprietor pay the damage. The latter was just as determined not to pay. In the first place he pleaded that if Mr. Ingalls had kept his seat, as he ought to have done, he would not have been hurt at all, for it was his leap to the pavement which had broken his arm and not the overturning of the coach. But the court held that where a passenger is placed, in consequence of the carrier's want of care, in a situation so perilous as to render his endeavoring to escape an act of precaution, the carrier is liable for the injury he receives in doing so, even though it afterwards turns out that if he had kept his seat he would not have been hurt at all. Then the coach proprietor resorted to another defence, and this time with success. He proved that he had his coach made of the best

materials in the market, that it had been carefully examined and inspected, but that the axle had broken on account of a hidden defect in its interior which nobody could have discovered or have been aware of. The court held that this was enough and that he was not liable. Carriers of passengers, that said, were bound to the utmost care and diligence, in the transportation itself and in providing safe and sufficient vehicles. But "where the accident arises from a hidden and internal defect which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment, then the carrier is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of a pecuniary recompense."¹

¹ It must strike the observer as somewhat strange that the law regards the safety of a chattel while in transit as of more importance than the life or person of a human being. A carrier of goods is (with two rare exceptions) an insurer of their safety. If there had been a basket of eggs on the top of the coach on which Mr. Ingalls was riding, and the broken axle had spilled them into the street, the coach proprietor would have had to pay for them. However, the distinction itself is not more absurd than the reasons which the courts continue to give for maintaining it. When property is intrusted to a carrier, say the courts, the owner loses all sight of it; it is inanimate and cannot take care of itself. What is there to prevent the carrier and some Jesse James of the road secretly making a divide of the property? To protect persons having dealings with carriers, we must make them insurers. "But *persons*," say the courts, "are very different—*they* can take care of themselves, and can exercise that vigilance and foresight in the maintenance of their rights which the owners of goods cannot do." This had a little show of sense when people rode in stage coaches, but we should very much like to see some one of our modern judges, who are so fond of applying this reason to the means of transit of to-day,

RAILROAD TIME TABLES AND CONTRACTS.

DENTON v. GREAT NORTHERN RAILWAY CO.

[5 El. & Bl. 860; Thomp. Ld. Cas. Carr. Pass. 52.]

On the 25th of March, 1855, Mr. Denton, an engineer of some eminence, had occasion to go from Peterborough to Hull, where he had an appointment for the next morning. He consulted the company's time-tables, and found there was a train leaving Peterborough at 7 p. m. which would land him at Hull about midnight. This just suited him, so he took his ticket for Hull and started by it. But when he got to a place called Milford Junction, where passengers change cars for Hull, he was informed by an obliging official that the late train to Hull had been discontinued, and that he could not get there that night. The fact was, that the line from Milford Junction to Hull belonged to the North-Eastern Railway Company, who till March 1st had run a train departing a few minutes after the arrival of the train leaving Peterborough at 7 p. m. But it had not run at all during March, and the Great Northern Railway Company had published their March time-tables, though they had had notice that it would not run. In consequence of the absence of this train, Mr. Denton did

“taking care of himself” and “exercising vigilance and foresight in the maintenance of his rights” in the midst of a railroad collision or a steamboat explosion.

not get to Hull in time to keep his appointment, and sustained damage to the amount of £5 10s., for which he sought to make the Great Northern Railway Company liable. He was quite successful. The company were held liable on the grounds:—

1. That they had been guilty of a false representation. “It is all one,” said Lord CAMPBELL, “as if a person duly authorized by the company had, knowing it was not true, said to the plaintiff, ‘There is a train from Milford Junction to Hull at that hour.’ The plaintiff believes this, acts upon it, and sustains loss. It is well established law that where a person makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the present case within that rule.”

2. That the time-tables amounted to a contract. “It seems to me,” said WIGHTMAN, J., “that the publication of these time-tables amounted to a promise to any one of the public who would come to the station and pay for a ticket, that he shall have one by the train at seven.”

POWER OF CARRIER TO LIMIT LIABILITY.

HOLLISTER v. NOWLEN.

[19 Wend. 234; 32 Am. Dec. 455; Thomp. Ld. Cas. Carr. Pass. 489.]

It was in 1838, before railroads were very numerous, that Hollister made a journey by stage from Utica to

Buffalo, New York. A traveller had to take an early start in those days, and the sun had not yet risen when Hollister got on the coach of the Telegraph Line, and saw his trunk safely stowed away in the boot. In all the stage-offices along the route, and in most of the public houses, there were hung large placards in big letters, with this notice: "All baggage sent or carried on the Telegraph Line is at the risk of the owners thereof." Whether Hollister read any of these notices no one will ever be able to find out, for no one saw him reading them. To be sure he said he never did, but then he may have lied about it. At any rate, before the coach had gone three miles on this memorable journey, it was discovered that somebody had climbed up at the back of the vehicle, cut the straps of the boot, and relieved the horses of pulling two hundred pounds at least. Then Hollister suggested to the carrier the advisability of recouping him for his loss, and the carrier (as usual) could not see it in that light. So they finally had to go before the Supreme Court of New York, and Nowlen's lawyer and that tribunal discussed the matter in a friendly way.

"We admit," said *Nowlen's lawyer*, "that we are *prima facie* insurers of the property we carry, but the law lets us make a different contract with our customers."

The court. "Yes; but we fail to discover any contract here."

Nowlen's lawyer. "When we say: 'Any one wanting to travel on our line must take the risk of their baggage,' and a man seeing our notice, gets in one of our coaches with his baggage, we have a right to presume that he has accepted our terms."

The court. “From his having said nothing? Not at all. You have no more right to assume from his silence that he consents than that he dissents. Silence sometimes signifies assent, but not in your case. The law casts on you legal obligations which a party has a right to insist on. If a man ordered a coat from a tailor after he had given him notice that he would not make any coat for less than \$100, the assent of the customer to pay that sum, although it were double the real value of the coat, might be implied. But if the tailor had been under a legal obligation not only to furnish coats to his customers, but to furnish them at a reasonable price, no such implication could arise.”

And Nowlen had to pay for Hollister's stolen trunk.

LIABILITY FOR INJURY TO FREE PASSENGER.

PHILADELPHIA, ETC., R. CO. v. DERBY.

[14 How. 468; Thomp. Ld. Cas. Carr. Pass. 31.]

One pleasant day about thirty years ago, Mr. Derby, who was a stockholder in the company, was invited by the president and officers of the Philadelphia and Reading Railroad to make a little excursion with them over the line. Unfortunately for him on

that very day, an engineer in charge of another locomotive on the road, attempted an experiment which, notwithstanding that it is uniformly unsuccessful, is still repeated at regular intervals to this day — he tried to have two trains pass each other on a single track. The result was disastrous to Mr. Derby and to Mr. Derby's bones, and he brought an action against the railroad for his injuries. The defence was that he was not a passenger, as he was travelling free of charge. But it was held that the duty of a carrier to transport safely does not arise from the consideration paid for the service, but on the contrary, is imposed by the law even where the service is gratuitous. "When carriers undertake to convey persons by the powerful, but dangerous agency of steam," said the Supreme Court of the United States, "public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such case may well deserve the epithet of 'gross.' "

TRAVELLING ON "FREE PASS" WITH CONDITIONS.

RAILROAD CO. v. LOCKWOOD.

[17 Wall. 357; Thomp. Ld. Cas. Carr. Pass. 378.]

Most people prefer travelling on a "pass" to paying fare. It is sometimes, though, a little disappointing when you have taken your seat in the car, and happen to glance over the "pass," to find that on the reverse side in very small type there is printed this condition :

"The person accepting this free ticket assumes all risk of accidents and expressly agrees that the company shall not be liable *under any circumstances whether of negligence of their agents or otherwise*, for any injury to the person or for any loss or injury to the property of the passenger using this ticket."

The "deadhead" will doubtless be gratified to learn that, so far as the words italicized are concerned, the American courts are decidedly averse to giving the company the benefit of them. The litigation which Mr. Lockwood carried on some years ago has done much to firmly establish this principle. He took a train on the New York Central Railroad on just such a ticket with just such a condition, which he had received from one of the officers of the company, not as an expression of friendship, but because Mr. Lockwood was a drover and was shipping a good many head of stock over the line. There was an "accident" and Mr. Lockwood was hurt. He brought an action and recovered a verdict. The railroad, as is the custom of railroads, fought the case as far as was pos-

sible — which in this instance was as far as the Supreme Court of the United States. But there Mr. Justice BRADLEY, in a very able and learned opinion which the student should not fail to read, affirmed the judgment in favor of Mr. Lockwood. The law on the subject he summed up thus :

1. A common carrier cannot lawfully make a contract for exemption from responsibility, when such exemption is not just and reasonable in the eye of the law.

2. It is not just and reasonable in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

3. These rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.¹

WHO CARRIER MAY REFUSE TO CARRY.

THURSTON v. UNION PACIFIC R. CO.

[4 Dill. 321 ; Thomp. Ld. Cas. Carr. Pass. 10.]

Thurston was a bad man to meet on a railroad train.

¹ As Lockwood's pass was given him as a part of the transaction of carrying his stock, it was held that he was a passenger for hire as much as though he had paid his fare. The court did not therefore decide what would have been the result had he been a purely gratuitous passenger. Other courts, however, have decided that this makes no difference. Lawson, Cont. Carr., sects. 212-221.

And yet travellers were very apt to run against him, for his business called him there very frequently. His sole stock in trade was three pieces of pasteboard, and he earned his living by making small bets with unsophisticated grangers, whom he generally met in the smoking car, concerning the identity of a particular card of the three. After the game was over, and when the shekels of the rural inhabitant were deposited in the pocket of Thurston, what used to puzzle the granger was how it came about that whenever he bet a small sum, he could generally locate the right card, and whenever he put up his pile, he always selected the wrong one. It was this sort of thing that gave Thurston the name of "monte-man," and that, one day having purchased his ticket on the defendant's road, caused the conductor of the train to prevent him from boarding it. The suit which he brought against the company gave the court an opportunity of stating in a very lucid way the law concerning the right of a carrier to refuse to carry.

And here it is in a dozen or more lines: "The railway company is bound as a common carrier, when not overcrowded, to take all proper persons who may apply for transportation over its line, on their complying with all reasonable rules of the company. But it is not bound to carry all persons at all times or it might be utterly unable to protect itself from ruin. It would not be obliged to carry one whose ostensible business might be to injure the line; one fleeing from justice; one going upon the train to assault a passenger, commit larceny or robbery, or for the purpose of interfering with the proper regulations of the company, or for gambling in any form or committing any crime; nor is

it bound to carry persons infected with contagious diseases to the danger of other passengers. The person must be upon lawful and legitimate business. Hence defendant is not bound to carry persons who travel for the purpose of gambling. As gambling is a crime under the State laws, it is not even necessary for the company to have a rule against it. It is not bound to furnish facilities for carrying out an unlawful purpose. Necessary force may be used to prevent gamblers from entering trains, and if found on them engaged in gambling, and refusing to desist, they may be forcibly expelled."

So the monte-man could not get any damages; but as he had paid for his ticket, and the company had not refunded him the money, the judge thought the jury should make that up to him, and they gave him a verdict for \$1.74.

WHAT IS "BAGGAGE" FOR WHICH CARRIER IS RESPONSIBLE.

NEW YORK CENTRAL R. CO. v. FRALOFF.

[100 U. S. 24; Thomp. Ld. Cas. Carr. Pass. 502.]

A Russian countess of large wealth and high position, after taking in London and Paris, concluded not to die till she had seen America. The pampered aris-

toocracy of Europe are not content to travel with a carpet-sack ; and so she must bring along with her half a dozen trunks, bursting with silks, and jewels, and laces, and fine linens, in order that she might not be without something to wear if she should want to go to the opera in New York, or be invited out to dinner in St. Louis. Her laces she was particularly proud of, for they had been made by her ancestors upon their estates in Russia. She arrived in New York in good order, and so did her trunks ; and all would have been well had she not made up her mind to visit Chicago, for on her way thither two of her trunks (which was all she dared trust in that wicked city) came to grief. On the train between Albany and Niagara Falls, some ruthless Nihilist ransacked her wardrobe, and failed to return two hundred yards of her much-prized lace. Then the countess said to the railroad company, "give me back the needlework of my grandmothers, or give me roubles." But the railroad company could not, or would not, and then the countess brought suit, and a jury thought that the laces were worth at least \$10,000. The company appealed, but the Supreme Court of the United States decided that they must pay the \$10,000. Baggage for which you are liable as an insurer, said the court to the company, is none the less baggage because it is extensive or valuable. The sole question is, was it suited to the condition of its owner. If a commercial traveller, or a country school-marm, were to carry thousands of dollars of expensive lace in her trunk, and it were to be lost on your road, you would not be hable ; but here, your passenger was a countess, and laces are made for

countesses, and are as necessary to them as plumage to peacocks. If you had notified all your passengers that you would not carry more than \$100 worth of baggage without extra payment, or if you had asked the countess the value of her trunks, and she had said, "Oh, not much," it would have been different; but you did not, and she was not bound to give you any information you did not ask for.

XIV. — NEGLIGENCE.

INJURY RESULTING FROM UNINTENTIONAL ACCIDENT.

BROWN v. KENDALL.

[6 Cush. 292.]

The trouble in this case came from a dog fight. The dogs of Brown and Kendall respectively were fighting, and the latter, in the laudable purpose of endeavoring to separate them with the aid of a long stick, unfortunately put out the eye of Brown who, unobserved of Kendall, was standing behind him. Brown brought an action, and the question was whether a person is liable for a purely accidental and unintentional injury which he may do to another. The court decided in the negative. “The plaintiff,” said Chief Justice SHAW, “must come prepared with evidence to show either that the *intention was unlawful* or that the *defendant was in fault*; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. If in the prosecution of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom.”

*ONE MUST SO USE HIS PROPERTY AS NOT TO
INJURE HIS NEIGHBOR'S.*

FLETCHER v. RYLANDS.

[3 Hurl. & C. 794; L. R. 1 Exch. 265; L. R. 3 H. L. 330; 1 Thomp. Ld. Cas. Neg. 2.]

Of the modern English cases, on the law of negligence, this one is perhaps the most important in the reports. Messrs. Rylands & Co., mill-owners, wanted a reservoir on their land, and like careful men, employed a competent engineer, and first-class workmen to make it. During its construction the workmen came upon some old vertical mine shafts of the existence of which no one was previously aware. These they carefully filled up with soil. But when the water came to be put in the reservoir, it was just like putting it into an empty flower-pot. It ran through and did a world of mischief to the neighboring mines of Mr. Fletcher, who instituted legal proceedings.

Rylands & Co. defended the action, thinking that as they had employed competent persons to construct the reservoir, they would not be held responsible. But here they were mistaken; they were compelled to compensate Mr. Fletcher for his damage. "If a person," said the court, "brings or accumulates on his land anything which, if it should escape, may cause damage, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he

may have been, and whatever precautions he may have taken to prevent the damage.”¹

¹ There is a difference of opinion in the American courts concerning the justness of this decision. In some States it is followed, in others it is not. Qualified, however, as it has been by two later decisions, the rule in *Fletcher v. Rylands*, strikes the writer as unassailable.

The first qualification was laid down in *Nichols v. Marsland*, L. R. 10 Exch. 255; 2 Exch. Div. 1. Mrs. Marsland was a fortunate proprietor of some ornamental lakes in the county of Chester. She had not made the lakes herself. They had existed time out of mind, and had always borne the character of being sober, respectable, well-behaved lakes. But on the 18th of June, 1872, there came a tremendous storm, the like of which the oldest inhabitant could not remember. The rains descended, the floods came, and Mrs. Marsland's lakes burst their fetters, and, in the riot of their new-found liberty, swept into eternity two or three county bridges. Nichols was the county surveyor of Cheshire, and brought this action for the damage done. It was argued for the surveyor, with much plausibility, that Mrs. Marsland was in the same position as a person who keeps a mischievous animal with knowledge of its propensities, and therefore that inquiry as to whether she had been negligent or not was needless—she kept the lakes at her peril. It was held, however, that as the lakes had been carefully constructed and maintained, and the downpour of rain was so extraordinary as to amount to *vis major*, the county bridges might build themselves up—it was no concern of the old lady's. *Shirley's Ld. Cas.* 208.

Several years after, in the case of *Box v. Jubb*, 4 Exch. Div. 76; 27 Week. Rep. 415, the same court held, that for the wrongful act of a *third party*, which set in motion the damage, the proprietor was no more responsible than for *vis major*.

*LIABILITY FOR INJURIES BY ANIMALS.***MAY v. BURDETT.**

[9 Q. B. 101; 1 Thomp. Ld. Cas. Neg. 174.]

It is rather dangerous to keep a monkey, especially if you know that it has a fondness for biting people. Mr. Burdett found this out after a little litigation which took place between himself and Mr. May. The former owned a monkey, which one day bit Mrs. May. The husband was indignant and brought an action against the owner. The question was whether it made any difference that Mr. Burdett had not been guilty of any negligence in securing or taking care of it. The court held that it did not, as "the gist of action is the *keeping* of the animal after knowledge of its mischievous propensities;" and Burdett had to pay £50 for the injury to Mrs. May.¹

¹ The liability of owners of animals for their hurting people is pretty plain. If a man has a domestic beast, such as a dog, a horse, or a cow, he is not generally responsible for any injury it may cause. But if he knows that it is of a mischievous disposition and is likely to do damage, then he keeps it at his peril. If he wants to run no risk he had better shoot it at once, for no matter how careful he may be, he is answerable for any hurt it may do to any person. Long ago a distinguished judge laid it down that every dog was entitled to one bite, because it took something like this to give the owner notice that he was a bad dog.

On the other hand, if a man keeps a dangerous animal, one *feræ naturæ*, as the books call them, such as a lion, or a bear, or a wolf, he is answerable in the same manner as the owner of a dog accustomed to bite. The lion or bear is not entitled to one bite, for the owner knows from the beginning what his pet will do if he only gets a chance.

SELLING POISON WITH HARMLESS LABEL.

THOMAS v. WINCHESTER.

[6 N. Y. 397; 1 Thomp. Ld. Cas. Neg. 224.]

Mr. Thomas walked one day into a country drug-store kept by a Dr. Foord and asked the druggist for some extract of dandelion, which the family physician had prescribed for Mrs. T. The druggist took down from a shelf a jar labelled " $\frac{1}{2}$ lb. *Dandelion, prepared by J. A. Gilbert, No. 108 John Street, N. Y., Jar. 8 oz.,*" and gave Mr. Thomas the quantity called for. This the latter gave to his wife, but with nearly fatal results, for, as it afterwards turned out, it was belladonna, a deadly poison, that the jar really contained. The druggist was quite innocent in the matter, for it had been sold to him for dandelion by Aspinwall, a druggist in New York, who, in turn, had purchased it as such from Winchester, a drug manufacturer. The latter had not manufactured the extract in this particular jar, but had purchased it, and put it up for the trade and labelled it with Gilbert's name, who was employed by him as a clerk. Mr. Thomas now brought an action against Winchester for the injuries sustained by his wife in taking the poison. Winchester tried to escape liability on the ground that there was no privity between him and the plaintiff, the drug having previously passed through so many hands.

"If A," argued Winchester's counsel, "build a wagon, and sell it to B, who sells it to C, and C hires

it to D, who, in consequence of the negligence of A in building it, is overturned and injured, D cannot recover damages against A, the builder, for A's obligation to build the wagon properly arises solely out of his contract with B." The court admitted that this was so, but the present case, they said, stood on a different footing. Winchester's liability arose, not out of any contract or privity between him and the person injured, but out of the duty which the law imposed on him to avoid acts in their nature dangerous to the lives of others. Therefore, a dealer in drugs or medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all persons who, without fault on their part, are injured by using it in consequence of the false label. And, therefore, Winchester was liable for the injury to the wife of Thomas.

REMOVING SUPPORT OF LAND.

PANTON v. HOLLAND.

[17 Johns. 92; 8 Am. Dec. 369; 1 Thomp. Ld. Cas. Neg. 249.]

Panton and Holland were owners of contiguous lots on Warren Street, in New York City. In the course of erecting a house on his lot, Holland dug some distance below the foundations of Panton's house, and

the result was that one of the corners of Panton's house settled, the walls were cracked and much injury was done to the building. For this, Panton brought an action, claiming that he had a right to lateral support from the land of his neighbor, not only for his own soil, but also for the buildings which he put up on it, and that, having removed this lateral support, Panton was absolutely liable for the damages caused thereby. But the court held that if injury is sustained to a building in consequence of the withdrawal of the lateral support of the neighboring soil, done with reasonable skill and care to avoid unnecessary injury, there can be no recovery, and therefore, if Holland had not been negligent in his digging, he could not be made to pay for the damage to Panton's house.

PERSONS COMING ON ANOTHER'S PREMISES.

INDERMAUR v. DAMES.

[L. R. 1 C. P. 274; L. R. 2 C. P. 311; 1 Thomp. Ld. Cas. Neg. 283.]

Mr. Dames was the owner of a sugar refinery, and employed one Duckham, a gas-fitter, to improve his gas-meter. Duckham got his work done by a certain Saturday evening; but it was arranged that he or one of his workmen should come on the following Tuesday to see if the improvement was working satisfactorily. Accordingly, on the Tuesday the plaintiff, Indermaur,

presented himself as Duckham's representative to look at the gas-meter. Now it happened that on the premises, and level with the floor, there was an unfenced shaft used for the purpose of hauling up bales of sugar. When the shaft was being used for that purpose, it was usual and necessary that it should be unfenced; but when not being used there was no particular reason why it should not be fenced. The experienced case-reader will not be surprised to hear that Indermaur was unfortunate — or fortunate — enough to fall through this shaft. The sugar people denied their liability to him, contending that he was a mere licensee, and that they were under no particular duty towards him. It was held, however, that he was *not* a mere licensee, as he had come on lawful business, and that, as the hole was from its nature unreasonably dangerous to persons not usually employed on the premises, the defendant was liable. The occupier of premises, said the court, is not bound to see that his premises are in such a safe condition that a trespasser or a mere licensee coming upon them, will be in no danger of breaking his bones; but with respect to a person who has come on lawful business, and on the invitation of the occupier, it is settled law that he "using reasonable care on his own part for his own safety is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

INJURIES FROM NON-REPAIR OF BUILDINGS.

TODD v. FLIGHT.

[9 C. B. (N. S.) 378.]

The late lamented Mr. Flight—the memory of the litigious is blessed—bought a shaky old house next door to a church. This he let to Benjamin Batt, who had occupied it but a short time when it fell down on the church. For this injury an action was brought against the landlord. Mr. Flight tried to make it out that Batt, the tenant, was the responsible party, but the court held that, as Flight had let the house when he knew it to be in a very dangerous condition, and as the building had fallen through old age, and not through the default of the tenant, it was he, the landlord, who must pay.¹

¹ The general rule is that the occupier, and not his landlord, is responsible for any injury arising to a third person through the premises being out of repair. And it does not much matter how careful he has been, if he has not succeeded in making his premises safe. A year or two ago a good old woman was toddling down a London street one afternoon when a large lamp, which was suspended from the front of a house and projected several feet across the pavement, fell upon her and injured her severely. The occupier of the house was tenant under a lease, and a short time before had noticed that the lamp was getting out of repair, and had employed a competent contractor to put it right. He thought, therefore, that he had done as much as could be expected of him. He thought wrong. “The question is,” said LUSH, J., “what is the duty of an occupier who has a lamp in the position of that of the defendant? Is it his duty absolutely to maintain that lamp in

*RES IPSÆ LOQUITUR—PRESUMPTION OF
NEGLIGENCE FROM ACCIDENT.*

BYRNE v. BOADLE.

[2 Hurl. & C. 722; Big. Ld. Cas. Torts, 578.]

One pleasant day in July, Mr. Byrne was walking down a London street, when a barrel of flour fell from a window of a building he was passing, plump on his head. The subsequent proceedings interested Mr. Byrne no more, he was taken home in a hack, and it was some time before he was able to get out of the house. When, however, he had sufficiently recovered to visit the scene of the accident, he found that the building was occupied by Mr. Boadle, a flour-dealer, and that it was one of Mr. Boadle's barrels that had kept him at home so long. Mr. Byrne brought an action at once against the flour-dealer, alleging that the

proper repair, or to employ a competent person to repair it? I apprehend that the wider duty is incumbent on the occupier." And so they all apprehended, and the plaintiff recovered. *Tarry v. Ashton*, 1 Q. B. Div. 100. But sometimes the landlord is the man to look to. "There are only two ways," it is said in a recent English case (*Nelson v. Liverpool Brewery Co.*, 2 C. P. Div. 210), "in which landlords or owners can be made liable in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone, being *prima facie* liable, — first, in the case of a contract by the landlord to do the repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as for instance where he lets premises in a ruinous condition." *Todd v. Flight* illustrates the second exception. *Shirley Ld. Cas.* 206.

latter, by his servants, had so negligently moved his barrels as to injure him to the extent of \$250 at least. The flour-dealer objected that some evidence of negligence on his part must be shown, but the court held that from the mere fact of the accident a presumption of negligence arose. "It is the duty of persons who keep barrels in a warehouse," said Chief Baron POLLOCK, "to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence."

*RESPONSIBILITY OF MASTER FOR WILFUL
ACTS OF SERVANTS.*

McMANUS v. CRICKETT.

[1 East, 106; 2 Thomp. Ld. Cas. Neg. 865.]

Mr. Crickett's servant Brown had a grudge against his neighbor McManus, and he only waited for a chance

to injure one of the McManus family in some way. At last an opportunity offered itself. Driving home his master's carriage one evening about dusk, Brown was delighted to see ahead of him the old four-wheeled chaise belonging to Mr. McManus, and seated in it was the owner himself, alone and unattended. Brown whipped up his team and dashed right into the chaise, upsetting it in the middle of the road and landing Mr. McManus on an adjoining door-step. Brown being, of course, an irresponsible fellow whom no civil judgment would have disturbed in the least, Mr. McManus brought an action against Mr. Crickett, claiming that, although the latter was not present at the time, he was nevertheless answerable for the wilful and malicious act of his servant. But the court did not agree to this, because they said that when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be responsible for such act.¹

¹ A principal or master is answerable in damages for wrongs committed by his agent or servant while acting about his business. This is the general rule. But in order that this may be so the servant must have been acting in the course of his regular employment. If while driving me or driving on my business my servant negligently injures a person, I am liable. But if the enterprise is entirely the servant's, — if, for instance, he takes his master's carriage without leave, for purposes entirely his own, — the master is not responsible. One May Saturday in 1869, a wine merchant sent a clerk and carman with a horse and cart to deliver wine at B., and to bring back a quantity of empty bottles to the offices, which were in M. On the homeward journey, after crossing London Bridge, they should have turned to the right; instead of that they turned to the left, and went in the opposite direction on some private matter of

*EMPLOYER NOT LIABLE FOR NEGLIGENCE OF
INDEPENDENT CONTRACTOR.*

HILLIARD v. RICHARDSON.

[3 Gray, 349; 2 Thomp. Ld. Cas. Neg. 868.]

Mr. Richardson made an agreement with a contractor named Shaw that the latter should make some alterations on a building of his, in Cambridge, Mass. In pursuance of this agreement one of Shaw's workmen who was engaged in hauling lumber to the place,

the clerk's. While thus going quite against their orders they ran over a child. It was held that the wine merchant was not responsible. *Whatman v. Pearson*, L. R. 3 C. P. 422.

And a master is not responsible for the wilful and malicious act of his servant while acting in his employment, but which wilful and malicious act he has neither ordered nor confirmed. *McManus v. Crickett* illustrates this exception. The student, however, should be careful to note that this doctrine does not interfere with the cases where a master is held liable for the negligent or malicious act of a servant, who had no purpose but the execution of his master's orders. For example, when a master authorizes his servant to use force about his business, the former is liable when the latter uses more force than the master intended he should. A railroad company instructs its conductors that if a passenger will not pay his fare they are to eject him, using force if he will not go without it. Under this authority a conductor demands a fare from a passenger who refuses to pay (perhaps because he has already bought a ticket which he has lost, or for some other reason), and who refuses to leave the car. The conductor calls the brakeman, and they proceed to eject him, but in doing so they use far more force than is necessary and the passenger is injured. For this act, though wilful and malicious on the servants' part, the company will be liable. See 2 Thomp. Ld. Cas. Neg. 884-890.

very negligently allowed some of it to remain in the street over night. The consequence was that when Mr. Hilliard drove along the street that evening, his horse took fright at the pile there, and the driver was thrown from his wagon and badly hurt. Hilliard brought an action against Richardson for damages, but without success, it being held that Shaw being an independent contractor, he, and not Richardson, had the control of the workman, and if any one was liable it was Shaw.¹

¹ The law on this subject was very consisely stated by an eminent English judge some ten years ago. "In ascertaining who is liable for the act of a wrong-doer," said he, "you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable." WILLES J., in *Murray v. Currie*, L. R. 6 C. P. 24. But as there are exceptions to every rule, we are prepared to find some here; and the student should note the following cases as being the most important exceptions to the rule that for the negligence of an independent contractor the employer is not answerable: —

1. *Where the employer personally interferes.* The proprietor of some newly built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the roadside. The proprietor said he would get it removed as soon as possible, and paid a man to cart it away. The man did not do his work thoroughly enough, and a person driving home was upset and injured. In an action by this person against the proprietor, it was urged that it was the contractor who was liable. But the proprietor was held liable on the ground that it did not appear that the contractor had undertaken to remove the gravel, and the proprietor had busied himself about it. *Burgess v. Gray*, 1 C. B. 578.

2. *Where the thing contracted to be done is unlawful.* A company, without the special powers for that purpose which they ought to have had, employed a contractor to open trenches in the streets of Sheffield. The plaintiff walking down the street fell over a heap of stones left there by the contractor, and broke her arm. She suc-

LIABILITY OF MASTER FOR INJURY TO FELLOW-SERVANT.

PRIESTLEY v. FOWLER.

[3 Mee. & W. 1; 2 Thomp. Ld. Cas. Neg. 919.]

Fowler was a butcher and Priestley was his man. It was Priestley's interesting duty to take meat around in a van to the various customers. These seem to have been pretty numerous, for one day such a quantity of shoulders of mutton and rounds of beef were put on board that the van broke down and Priestley's thigh

ceeded in getting damages out of the company, the distinction being clearly drawn between a contractor being employed to do something lawful and to do something unlawful. *Ellis v. Sheffield Gas Consumer Co.*, 2 El. & Bl. 766.

3. *Where the thing contracted to be done is perfectly lawful in itself, but injurious consequences must in the natural course of things arise, unless effectual means to prevent them are adopted.* Mr. Robbins, of Chicago, had let to one Button, the contract to build a storehouse on his lot, which work required an excavation to be made in the street, that if unguarded was liable to entrap some unwary pedestrian. Button after he had made the excavation neglected to guard it, and a pedestrian fell in, as was to be expected. Under these circumstances it was held that Robbins was liable for the injury. *Robbins v. Chicago*, 2 Black, 418; 4 Wall, 657.

4. *Where the employer is bound by statute to do a thing efficiently.* A railroad company were authorized by act of Parliament to make an opening bridge over a navigable river. They employed a contractor, and that gentleman ingeniously made them a bridge which wouldn't open. The plaintiff's vessel was in consequence prevented from navigating the river, and the company were held responsible to him. *Hole v. Sitting Bourne R. Co.*, 6 Hurl. & N. 488; *Shirley's Ld. Cas.* 202.

was fractured. The butcher boy now brought an action against his master, but it was held that the action would not lie. "If the master be liable to the servant in this action," said Lord ABINGER, "the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage, to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness, arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down, while asleep, and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. The inconvenience, not to say

the absurdity, of these consequences affords a sufficient argument against the application of this principle to the present case."

FARWELL v. BOSTON, ETC., R. CO.

[4 Metc. 49; 2 Thomp. Ld. Cas. Neg. 924.]

Farwell was an engineer on the Boston & Worcester Railroad, and one day late in October, 1837, was running his locomotive (behind which were several passenger cars) along the road as usual, when all of a sudden the locomotive leaped from the track, and after cavorting round in the ditch for some time, came to a standstill, not, however, until it had broken several of Farwell's bones. The cause of this deplorable accident was, as often happens, the negligence of one Whitcomb, who had charge of the switch, and who had very carelessly left it open. Farwell now sued the company for the injury, and the case came before the Supreme Judicial Court of Massachusetts. "This is an action of new impression in our courts," said Chief Justice SHAW, "and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one

and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer.” This question the court resolved in the negative, and Farwell was thus unable to obtain damages for his injury from the company.¹

¹ It is not often that a servant can bring an action against his master in respect of an injury sustained in the course of the service. He is supposed at the time of entering on the service to have contemplated all the ordinary risks thereof; to have made allowance for them in his wages, and he is not bound to risk his safety, but may decline to enter into the service if he thinks there are too many dangers. One of these risks, which he is taken to have contemplated, is the risk of one of his fellow-servants engaged in a common employment, negligently causing him an injury; and in such a case the master could not be successfully sued. Take, for instance, the case of a railroad accident happening through the engineer's negligence: every ordinary passenger who has been injured can get compensation out of the company; but the conductor, brakeman, and the fireman, no matter how innocent of negligence, cannot; they are fellow-servants of the engineer, and engaged in a common employment.

It is, however, a master's duty to take reasonable precautions to insure the safety of his servants. If he has omitted to provide competent fellow-servants, or safe and efficient machinery, or if his own personal negligence, or that of one who may be regarded as a deputy-master, or as a servant of the same master but engaged in a different employment, has conduced to the accident; in such cases he is not exempt from liability. Even, however, in cases where the machinery provided by the master was not safe and efficient, the master is not liable if the servant was equally well aware how defective it was, and in spite of that knowledge went on working with it. *Shirley's Ld. Cas.* 196.

CONTRIBUTORY NEGLIGENCE.

BUTTERFIELD v. FORRESTER.

[11 East, 60; 2 Thomp. Ld. Cas. Neg. 1104.]

Mr. Forrester was a citizen of the town of Derby, and at the time to which our story relates was engaged in the laudable enterprise of enlarging and improving his house. This was all very well; but in carrying out his repairs he was guilty of the high-handed and unwarrantable act of putting poles across the king's highway. Just about dusk one August evening, while the things were in this improper state, Mr. Butterfield was riding home. With reckless disregard for his own and the liege's safety, he went galloping through the streets "as fast as his horse could go;" and the reader will scarcely be surprised to hear that he rode plump up against Mr. Forrester's obstruction, and, that a moment later, as the poet says (though, if we remember right, not exclusively in reference to Mr. Butterfield), "there lay the rider distorted and pale." Conceiving with a great deal of sense, that the most effectual way of restoring his health would be by a verdict and damages, he brought this action; but his own careless riding was held to be as complete an obstacle to his success as Mr. Forrester's pole had been to his horse. "A party," said Lord ELLENBOROUGH, C. J., "is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and or-

dinary caution to be in the right. * * * One person being in fault will not dispense with another's using ordinary care for himself."

DAVIES v. MANN.

[10 Mee. & W. 545; 2 Thomp. Ld. Cas. Neg. 1105.]

"The plaintiff having fettered the forefeet of an ass belonging to him, turned it into a public highway, and at the time in question, the ass was grazing on the off side of a road about eight yards wide when the defendant's wagon with a team of horses came along." The wagon was going a great deal too fast, and was not being properly looked after by its driver, and the consequence was that it caught the poor beast, which could not get out of the way, and hurled it into that bourne whence returneth neither man nor donkey. The owner of the donkey now brought an action against the owner of the wagon, and, in spite of his own stupidity, was allowed to recover, on the ground that if the driver of the wagon had been decently careful the consequences of the plaintiff's negligence would have been averted. "Although," said PARKE, B., "the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying

asleep there, or the purposely running against a carriage going on the wrong side of the road.”

The doctrine of contributory negligence is based on the common-sense maxim, *volenti non fit injuria*, — i.e., the man who is the author of his own hurt has no right to complain of it; his own folly disentitles him to anybody’s sympathy or money. But *Davies v. Mann* lays down a very sensible qualification to this rule, viz.: If the defendant by being ordinarily careful would have averted the consequences of the plaintiff’s negligence, — in other words, if the regrettable accident would never have happened if the defendant had behaved as he ought to have done, — then the plaintiff is entitled to recover in spite of his negligence.

IMPUTED NEGLIGENCE.

BENNETT v. NEW JERSEY RAILROAD.

[36 N. J. (L.) 225; Thomp. Ld. Cas. Carr. Pass. 281.]

Just where a street-car track and a railroad track crossed each other in Jersey City there was a smash-up one day, a locomotive of the New Jersey Railroad running into a street-car which was attempting to cross over. It was not denied that both the engineer of the locomotive and the driver of the horse-

car were guilty of negligence. Mr. Bennett, who was sitting in the latter vehicle at the time, and who was a good deal hurt, sued the railroad company, and the jury gave him \$5,000 damages. The company appealed to the Supreme Court on the ground that Mr. Bennett had been guilty of contributory negligence. "Where is the contributory negligence?" the court inquired. "I will show you," said the railroad lawyer; "the driver of the horse-car was negligent, and as Bennett was a passenger thereon, he is so 'identified' with the driver as to be responsible for his acts. In the case of *Thorogood v. Bryan*,¹ the English court of Common Pleas so decided in the year 1849." But the New Jersey court very properly refused to follow the English ruling, and the railroad was compelled to pay. "I have entirely failed to conceive," said BEASLEY, C. J., "how it is that the passenger in a public conveyance becomes identified in any legal sense with the driver of such conveyance. Such identification could result only in one way—that is, by consider-

¹ In *Thorogood v. Bryan*, 8 C. B. 114; (Thomp. Ld. Cas. Carr. Pass. 273), the action was by the wife of Thorogood, who had been killed under the following circumstances: He was a passenger in an omnibus, in alighting from which he was run over by an omnibus of another line belonging to the defendant. The injury was the result of the concurrent negligence of both drivers, and it was held that this being so the widow could recover nothing. This case has been much criticised both by later English judges and text writers. The American courts decline to follow it—except in Pennsylvania. Here is, perhaps, the place to warn the student, so far as the law of carriers is concerned, not to pay much heed to the decisions of the Supreme Court of Pennsylvania, at least during the past ten or fifteen years. The Pennsylvania Railroad appears to "run" that tribunal with the same success that it does its own trains.

ing such driver the servant of the passenger. * * *
The passenger has no control over the driver or agent in charge of the vehicle, and it is the right to control the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant. To hold that the conductor of a street-car or of a railroad train is the agent of the numerous passengers who may chance to be in it, would be a pure fiction."

CONTRIBUTORY NEGLIGENCE OF CHILDREN.

LYNCH v. NURDIN.

[1 Q. B. 29; 2 Thomp. Ld. Cas. Neg. 1140.]

Mr. Nurdin was an egg merchant, and used to send his servant with a cart to deliver eggs to his customers. One day, when the man was out with the cart as usual, he imprudently left it for half an hour or so standing by itself in the street, drawn up by the side of the pavement. While he was away, some little children began playing about the cart, climbing into it and having all kinds of games. Amongst them was a little boy, who may be said to be the hero of this thrilling narrative, aged six years. He was in the act of climbing the step with a view to securing a box-seat, when another mischievous little beggar pulled at the horse's bridle. The old horse, obeying its natural

master, man, moved on, and the little Lynch was thrown to the ground, and the wheel went over him.

The child now brought an action for damages against the egg merchant, and because he *was* a child he was successful. He had done wrong; he had no right to get on the cart, and if he had abstained from doing so he would not have been injured. But the care which would have been expected of a man was not to be asked of so young a child. "The question remains," said Chief Justice DENMAN, "can the plaintiff consistently with the authorities maintain his action, having been at least equally in fault? The answer is that supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child acting without prudence or thought has, however, shown these qualities in as great a degree as he could be expected to possess them, His misconduct bears no proportion to that of the defendant which produced it."

CONTRIBUTORY NEGLIGENCE OF PARENT.

HARTFIELD v. ROPER.

[21 Wend. 615; 2 Thomp. Ld. Cas. Neg. 1121.]

One day in the winter of 1836, a child only two years old was playing in the beaten track of a public highway, alone and unattended. A sleigh, without bells, driven by Mr. Roper, came along over this road, at a moderate speed, and the driver succeeded in running over the child before he discovered his presence. For the injuries thus sustained, the child brought an action against the persons in the sleigh. He did not, however, succeed. Though a child of such tender years was incapable of using that ordinary care which is required of an adult, and though *his* contributory negligence could not affect him, it was nevertheless held that the want of such care on the part of his parents was a sufficient answer to the action. For a parent or guardian to allow a child only two years of age to wander and play unattended on a public road was clearly negligence, and this negligence furnished a complete defence to an action by the child for the injury sustained.¹

¹ "The rule which imputes the negligence of parents to children," says Judge THOMPSON, in his work on "Negligence," "has received the support of subsequent decisions in New York, and of the courts of last resort in Massachusetts, Maine, Maryland, Indiana, Illinois, California and Nebraska. On the contrary it is denied in Pennsylvania, Vermont, Connecticut, Ohio, Virginia, Missouri and Alabama that the failure of the parent to exercise proper care over the child, such that it shall be restrained within safe limits, can affect the child's right of action for injuries sustained through the negligence of third persons."

PROXIMATE AND REMOTE CAUSE.

SCOTT v. SHEPHERD.

[2 W. Black. 892; 1 Smith's Ld. Cas. 549.]

Probably no case except *Coggs v. Bernard* is better known to the lawyer than the celebrated "Squib Case." It cannot be said, however, that its importance is equal to its popularity. In days gone by it served to illustrate the distinction between the action of trespass and the action on the case; but it is now only worth remembering as an authority on the question of consequential damage. The facts are well related by the Apprentice of Lincoln's Inn: —¹

" Facts o' case first. At Milbourne Port
Was fair day, October the twenty and eight,
And folk in the market like fowls in a crate;
Shepherd, one of your town-fool sort.
(From Solomon's time they call it sport,
Right to help holiday, just make fun louder),
Lights me a squib up of paper and powder
(Find if you can the law-Latin for't).
And chucks it, to give their trading a rouse,
Full i' the midst o' the market-house.
It happened to fall on a stall where Yates
Sold ginger-bread and gilded cates.
(Small damage if *they* should burn or fly all);
To save himself and said ginger-bread loss,
One Willis doth toss the thing across
To stall of one Ryal, who straight on espial.

¹ Leading Cases Done into English. By An Apprentice of Lincoln's Inn. London, 1876.

Of danger to *his* wares, of self-same worth,
Casts it in market-house farther forth,
And by two mesne tossings thus it got
To burst i' the face of plaintiff Scott.
And now 'gainst Shepherd for loss of eye,
Question is, whether *trespass* shall lie."

Shepherd objected that he was not responsible for what had happened when the squib had passed through so many hands; but though he persuaded the learned Mr. Justice BLACKSTONE to agree with him, the majority of the court decided that he *must be presumed to have contemplated all the consequences of his wrongful act* and was answerable for them.

FENT v. TOLEDO, ETC., R. CO.

[59 Ill. 349; 1 Thomp. Ld. Cas. Neg. 136.]

A warehouse and lumber yard were near the track of the Toledo and Peoria Railroad Company, at Fairfield, Ill., a very good situation for some reasons, and a bad one for others. One day in October, 1867, a locomotive came along, belching out great clouds of thick smoke and live cinders. There had been no rain in the neighborhood for some weeks, and so, when some of the coals fell on the lumber there was a big blaze, which was not extinguished until it had devoured not only the warehouse and lumber yard, but likewise Mr. Fent's house, which was located two hundred feet from the warehouse, from which the fire-

spread. The railroad company could not deny their negligence, and consequently their liability, for burning the warehouse and lumber yard, but they firmly refused to pay any damage for Mr. Fent's house. When he brought an action against them, they argued that, as the house was set on fire, not by sparks from the locomotive, but from sparks from the burning warehouse, they were not liable, because they were only the remote and not the proximate cause of the loss. And what, they asked, will become of us poor railroads if, by a spark from a locomotive, a house near the track catches on fire, which spreads and burns down a whole town, and we are made to pay for the whole damage. But, notwithstanding this touching appeal, the court decided against the company. "If loss has been caused by the act," said LAWRENCE, C. J., "and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause whether the house burned was the first or the tenth — the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire." As to the second point, the court was unable to see the force of an argument which proceeded upon the assumption that it was better to distribute a great loss among a hundred innocent victims than to visit it all on the wrong-doer.

XV. — MISCELLANEOUS TORTS.¹

NUISANCES.

ST. HELEN'S SMELTING CO. v. TIPPING.

[11 H. L. Cas. 642; Big. Ld. Cas. Torts, 454.]

Mr. Tipping, of Lancashire, manifested his objections to smoke in a very practical way. Having purchased a house and grounds situated within a short distance of the works of a copper smelting company, he found very soon that to live in that region was simply out of the question. From the tall chimneys of the works smoke and noxious vapors issued night and day; it injured his trees and shrubbery; made his cattle sick, and rendered his own existence intolerable. Mr. Tipping therefore resorted to an action for damages. The company proved that the whole neighborhood was studded with manufactories and tall chimneys; that there were some alkali works close to their own, whose smoke was quite as injurious as theirs, and that the smoke of both sometimes united, making it impossible to say to which of the two any particular injury was attributable. They also relied on the fact

¹ A tort is an injury which involves no breach of contract.

that their works had existed before the defendant bought his property. Nevertheless, Mr. Tipping recovered £361 damages, and although the company carried the case all the way to the House of Lords, all the judges thought him entitled to the verdict.

“In matters of this description,” said Lord Chancellor WESTBURY, “it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one’s enjoyment, one’s quiet, one’s personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in

the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to the circumstances, the immediate result of which is sensible injury to the value of the property." And the judges held, also, that the fact that the locality where the offensive trade was carried on was one generally employed for the purpose of that and similar trades, would not exempt the company from liability to an action for damages in respect of injury created by it to property in the neighborhood.

FALSE REPRESENTATIONS.

PASLEY v. FREEMAN.

[3 Term Rep. 51; 2 Smith's Ld. Cas. 157.]

Pasley was a person who dealt in that curious export of Mexico, cochineal, and wanted a purchaser for a quantity he had on hand. Happening to make known his want to Freeman, that worthy instantly said he

knew somebody who would buy the cochineal — a Mr. Falch. “Is he a respectable and substantial person?” asked Pasley. “Certainly he is,” answered Freeman, well knowing that he was nothing of the sort. On the faith of this representation, Pasley let Falch have sixteen bags of cochineal, of the value of nearly £3,000, on credit. It then turned out that Falch was a man of straw, and as Pasley had not the remotest prospect of getting the £3,000 from him, he sued Freeman for “telling a lie,” and got his money that way.

The fourth section of the Statute of Frauds, enacts, amongst other things, that a promise to answer for the debt, default, or miscarriage of one of your friends, must be in writing, or it shall not bind you. Why, then, was Freeman held liable? The answer is that, whereas the section refers exclusively to *contracts*, Pasley sued Freeman in *tort*; and the principle affirmed in the case is, that “wherever deceit or falsehood is practiced to the detriment of another the law will give redress.” And it is no defence to an action of this kind that the defendant had no interest in and was to gain nothing from telling the lie.

The Apprentice of Lincoln’s Inn thus renders this memorable decision : —

It was Pasley came with his felaw
to London town with wares to sell,
sixteen bags of the fine cochineal,
for buyers who should like them well.

Stood up a buyer and spoke so fair;
John Christopher Falch he had to name;
“Right well me liketh the cochineal fine,
and I will freely buy the same.”

“ If ye be fain to buy our wares,
we must wot one thing or ere we sell;
ye shall do us to wit if ye be of worth,
a man to trust and credit well.

“ For but and the silver and gold were paid,
this day were a day to rue full sore:
two thousand pound is not the worth,
nor if ye tell six hundred more.”

Joseph Freeman stood up and spake:
“ I rede you let the wares be sold,
John Christopher is a man of trust
for the white silver and eke red gold.”

They have given their wares to John Christopher,
and set him a day to pay in hand;
John Christopher's fled o'er the wan water
and left no goods within the land.

Pasley is woxen as a man wood,
to sit still him seemed nothing meet;
said, We'll up and sue this false Freeman,
to do us right for his deceit.

There was Grose the one justice,
said this was but a lewed thing,
for where ye find no word of promise,
no action lieth for bare lesing.

Buller, was the other justice,
said, Here is a damage and deceit;
where by word of man be comen these twain,
the third is, to requite his cheat.

Ashhurst was the third justice,
said, Though he gain not by the lie,
his malice is yet more curst of kind
than if he had hope to win thereby.

Lord KENYON was the chief justice,
said, Full little is left to tell;
but the fraud was plain and eke the loss,
and I hold this action lieth well.

So Pasley won that cause as then;
 but merchants had thereof affright,
 and have letten ordain in Parliament,
 such words shall have no harm ne might
 to hold one bound for his fellow's trust,
 but if they be written in black and white.¹

LANGRIDGE v. LEVY.

[2 Mee. & W. 519; 4 Id. 337.]

Mr. Langridge, senior, walking one day down the streets of Bristol, noticed a gun in a shop window with the following seductive advertisement tied round its muzzle: —

“Warranted, this elegant twist gun by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas; can be had for 25.”

He entered the shop, which was the defendant's, and told him he wanted a nice, quiet, steady-going gun for the use of himself and his son. Finally, he bought the elegant twist-gun, as warranted. Now, we regret

¹ *Pasley v. Freeman* was substantially if not in form a violation of the Statute of Frauds. Viewing it in this light, Parliament passed an act in the ninth year of George the Fourth's reign, which provided that no one who had eulogized another's "character, conduct, credit, ability," etc., in order to induce people to trust him, should be liable to an action for false representation, unless his eulogy were in writing and signed by him. This is generally known as Lord Tenderden's act, so named after its author, and it has been copied into the statutes of at least ten States of the Union. See Browne on Stat. Fr., sect. 181.

to say, this warranty was false and fraudulent, to the defendant's knowledge, and, shortly after the purchase, one of the young Langridges was using the gun in a perfectly fair and sportsmanlike manner when it burst and blew off his left hand.

It was this victim of Levy's dishonesty who now brought an action against him, and the chief point relied on by the defendant's counsel was that, if any one had a right to bring an action, it was the father, to whom the gun had been sold; as for the son, they said, there was no privity of contract between him and the gunsmith. This defence, however, did not succeed; and the youthful Langridge got as much consolation as money could give him for the loss of his hand.

The reason of this result was that Levy had been guilty of a tort in making a false representation. If he had made no false representation he would have only been liable to the father for the breach of contract. As it was, he was held liable to the son, who confided in the representation, and who, he knew, was going to use it. Said Baron PARKE, who delivered an exhaustive judgment in the Court of Exchequer: "It the instrument in question which is not of itself dangerous, but which requires an act to be done — that is, to be loaded — in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had

been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*, which principle is that a mere naked falsehood is not enough to give a right of action ; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him ; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person, to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit ; nor could it make any difference that the third person *also* was intended by the defendant to be deceived ; nor does there seem to be any substantial distinction, if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view *that the plaintiff should use the instrument* in a dangerous way, and unless the representation had been made, the dangerous act would never have been done.”

RIGHTS OF FINDERS—POSSESSION—PRESUMPTION.

ARMORY v. DELAMIRIE.

[1 Stra. 504; 1 Smith's Ld. Cas. 471.]

A youthful chimney-sweep was fortunate enough to find a very valuable jewel. You or I, had we found such a treasure, might have advertised it in the newspapers. Not so our young friend. By his lights finding was keeping, and he took it to a jeweller's to ascertain its value. The jeweller, taking advantage of the boy's simplicity, told him it was a rubbishy thing, and offered him three half-pence for it, — a munificent offer which the lad declined without thanks, and demanded his prize back.

“For all his words they gave him for the nones
The socket empty and withouten stones,
And laugh upon him and gan call him thief:
Therefore full wisely telleth he his grief
To men of law, which answered him anon.”

And what the men of law answered him anon was to this effect: “You have fairly found this jewel, and nobody except the real owner has a better title to it than yourself; till he shall appear, you may keep it against all the world, and maintain trover for it.”¹

¹ The finder of a chattel stands in the shoes of the real owner until that person turns up. Therefore, if Smith should find a watch on Monday, and on Tuesday lose it, and Jones find it this time, Smith could recover it from Jones, if the original owner was still

Having settled this point, the judges now turned to the value of the jewel. The jeweller had refused to produce the stone, and so several of the trade were examined as to the value of a jewel of the finest water that would fit the empty socket, and it was held that everything would be presumed against the jeweller, and that the chimney-sweep should have the value of the very best jewel of the size taken, on the principle of the maxim *omnia præsumuntur spoliatores* — every presumption is made to the disadvantage of the wrong-doer.

“INJURY” WITHOUT DAMAGE.

ASHBY v. WHITE.

[Ld. Raym. 938; 1 Smith's Ld. Cas. 342.]

Ashby brought an action against the officers of an election for refusing to receive his vote. The candidates for whom he intended to vote were elected; but in spite of this, and although he had sustained no

unknown. But the chief point on which the well-known case of *Armory v. Delamirie* is an authority, is as to what is sufficient to enable a person to maintain an action of trover. It is not merely the person in whom resides the right of *property* who can maintain such an action. The chimney-sweep had not that right. It was all along in the person who had lost the jewel. All the chimney-sweep had was the right of *possession*, but it was considered that

actual damage, it was held finally that such an action could be maintained. Chief Justice HOLT in this case covered himself with glory as with a cloak. He was unanimously overruled in his own court. "My brothers," said he, "differ from me in opinion, and they all differ from one another in the reasons of their opinion, but notwithstanding their opinion, I think the plaintiff ought to recover. * * * I will do these two things. First, I will maintain that the plaintiff has a right and privilege to give his vote. Secondly, in consequence thereof, that if he was hindered in the enjoyment or exercise of that right, the law gives him an action against the disturber and that this is the proper action given by the law." The Chief Justice maintained these two propositions so well, that when the case went to the House of Lords, the majority opinion in his own court was overruled, and Ashby was triumphant.

DAMAGE WITHOUT "INJURY."

CHASEMORE v. RICHARDS.

[7 H. L. Cas. 349.]

A town cannot easily have too good a supply of water, and no doubt the Board of Health of the town

that was quite a sufficient foundation for an action of trover as against a mere wrong-doer. On the same principle (viz.: that mere possession is sufficient as against a wrong-doer) rests a well-

of Croydon were public benefactors when in the year 1851 they sank a substantial well and supplied the good people of Croydon with pure water at the rate of six hundred thousand gallons a day. But the public gain was Mr. Chasemore's loss. That gentleman was the occupier of a mill situated on the river Wandle about a mile from Croydon, and had — he and his predecessors — used the river for the last seventy years for turning his wheels. It may well be imagined, therefore, that he was extremely disgusted to find that the effect of what the Board of Health had done was to prevent an enormous quantity of water from ever reaching the Wandle or his mill. The miller, they say, wots not of all the water that goes by his mill. Very likely. But Chasemore wotted of a good deal of water that did *not* go by his mill, and went to law. Unfortunately, however, he was not successful. The judges told him that, though he was very much to be sympathized with, he had no legal remedy. There was damage (*damnum*) but not injury (*injuria*).

This case and *Ashby v. White* illustrate the distinction between what the lawyers call *injuria sine damno* and *damnum sine injuria*; *i.e.*, injury where there is no damage, and damage where there is no injury. If a man can show the former he is all right—he may rely on getting some recompense at the hand of the law; but if he can only show the latter, his case is hopeless. Wherever a person has sustained what the law calls an “injury,” there he may bring an ac-

known rule in actions of ejectment, namely, that the plaintiff must recover by the strength of his own title, and not by the weakness of his opponent's. Possession, as to the popular adage has it, is nine-tenths of the law.

tion without being under the necessity of proving special damage, because the injury itself is taken to imply damage. A banker once dishonored the cheque of a customer who really had plenty of money in the bank, and the customer thereupon brought an action against him. It was held that the action was maintainable, although the plaintiff had not sustained any loss whatever by the banker's wrongful act. There was no *damnum*, but there was *injuria*, and that was quite sufficient.¹ Such was Mr. Ashby's case; he could show no "damage," but he had sustained an "injury" and hence his action was allowed.

On the other hand it is not everything that the law brands as an "injury." The most terrible wrongs may be inflicted by one man on another without redress being obtainable. If you are driving a flourishing trade as a schoolmaster, and I come and set up a school just opposite to yours, and the boys desert you and flock to me, there is no "injuria" here, even though I may have turned schoolmaster for the express purpose of ruining you. It is *damnum sine injuria*, and you have no right of action against me. Mr. Chasemore's complaint was one of this kind; he had suffered damage enough, a good deal more than Mr. Ashby had, — but there was no legal "injury" to him, in what the Board of Health had done.

¹ *Marzetti v. Williams*, 1 Barn. & Adol 415.

*TRESPASS.***THE SIX CARPENTERS' CASE.**

[8 Coke, 146; 1 Smith's Ld. Cas. 217.]

It was on a warm September afternoon in the early days of James the First, that six thirsty carpenters entered a London tavern, called the waiter, one John Ridding, and "did there buy and drink a quart of wine, and there paid for the same." Mark that, gentle reader, they *paid* for it. But a quart of wine does not go far with six lusty workingmen, and the reader will scarcely be surprised to hear that, like Oliver Twist, they asked for more. The waiter accordingly brought them "another quart of wine and a pennyworth of bread, amounting to 8d." Whether the worthy publican acted on the principle that when men have well drunk they will be satisfied with any poison, or whatever the reason may have been, when the banquet was over and the reckoning came, our friends stoutly refused to pay. For this indignity the landlord brought an action of trespass against the whole six, and the question now was, whether this non-payment made their original entry into the tavern tortious; in other words, whether it made them *trespassers ab initio*.

This question was decided in the negative, the judges holding that mere *non-feasance* is not enough to make a man a trespasser *ab initio*. Two things, they added, must always concur to make a man a trespasser *ab initio*: first, he must be guilty of *mis-feasance*; and

secondly, the authority he abuses must be one given him by *the law* and not by an individual.

The authority these gentlemen abused was clearly one conferred on them by the law. The law gives every man a right to enter and take his ease in an inn, and if they had been guilty of *misfeasance* (e.g., if they had broken mine host's glasses or his head) they would have been trespassers *ab initio*. But they were only guilty of *nonfeasance*, viz., of declining to pay for their liquor. The reason why *misfeasance* does not make a man a trespasser *ab initio* when the authority is conferred by an individual, would seem to be that those who voluntarily give powers can limit or recall them as they please, while the abuse of powers given by the law needs a more stringent protection.

The "Apprentice of Lincoln's Inn" has turned the Six Carpenters' Case into poetry, with what success the reader may judge from the following:—

"This case befell at four of the clock
(now listeneth what I shall say),
and the year was the seventh of James the First,
on a fine September day.

The birds on the bough sing loud and sing low,
what trespass shall be *ab initio*.

It was Thomas Newman and five his feres
(three more would have made them nine),
and they entered into John Vaux's house,
that had the Queen's Head to sign.

The birds on the bough sing loud and sing low,
what trespass shall be *ab initio*.

They called anon for a quart of wine
(they were carpenters all by trade),
and they drank about till they drank it out,
and when they had drunk they paid.

The birds on the bough sing loud and sing low,
what trespass shall be *ab initio*.

One spake this word in John Ridding's ear
(white manchets are sweet and fine):

"Fair sir, we are fain of a penn'orth of bread
and another quart of wine."

The birds on the bough sing loud and sing low,
what trespass shall be *ab initio*.

Full lightly thereof they did eat and drink
(to drink is iwis no blame).

"Now tell me eight pennies," quoth Master Vaux;
but they would not pay the same.

The birds on the bough sing loud and sing low,
what trespass shall be *ab initio*.

"Ye have trespassed with force and arms, ye knaves
(the six be too strong for me),

but your tortious entry shall cost you dear,
and that the King's court shall see."

The birds on the bough sing loud and nought low,
your trespass was wrought *ab initio*.

Sed per totam curiam 'twas well resolved
(note, reader, this difference)

that in mere not doing no trespass is,
and John Vaux went empty thence.

The birds on the bough sing loud and sing low,
no trespass was here *ab initio*.

POWERS OF SHERIFFS.

SEMayNE'S CASE.

[5 Coke, 91; 1 Smith's Ld. Cas. 183.]

This case is the principal authority for the old
saying that "a man's house is his castle."

Berisford and Gresham were two gay young sparks of the sixteenth century. They were great chums, and lived together in a house at Blackfriars, of which they were joint tenants. Berisford, as in the manner of gilded youth, plunged deeply into debt, and one of the largest and most pressing of his creditors was a gentleman who may or not have been his tailor, a Mr. Semayne, to whom he “acknowledged a recognizance in the nature of a statute staple;” — a ceremony which would be pretty much like a Berisford of our day giving an I. O. U., or otherwise committing himself on paper. In these impecunious circumstances, he was lucky enough to die, and, by right of survivorship, the ownership of the house in Blackfriars became vested in the bereaved Gresham. Now, in that house were “divers goods” of the late Mr. Berisford, and to these, in virtue of the little formality of the statute staple, Semayne not unreasonably considered himself entitled. Accordingly, he gave instructions to the sheriffs of London to go and do the best they could for him, and those functionaries, armed with the proper writ, set off for Blackfriars. But, when they came to the house, Gresham, who had an inkling of what they had come for, shut the door in their faces, “whereby they could not come and extend the said goods.” It was for thus “disturbing the execution,” and causing him to lose the benefit of his writ, that Semayne brought this action. Much, however, to his surprise and disgust, he did not succeed, for the judges said that Gresham had done nothing wrong in locking the front door. And they resolved that the following was the law of the land on the subject:—

1. The house of every one is his castle, and if thieves

come to a man's house to rob or murder and the owner or his servants kill any of the thieves in defence of himself or his house, it is no felony.

2. It is not lawful for the sheriff at the suit of a common person to break into the defendant's house in order to execute any civil process — the defendant's house is his castle.

3. A man's house is *not* his castle when the king is a party, — *i.e.*, when the man is wanted for a felony or misdemeanor. But even then, before the outer door is broken open, the caller ought to ask to be allowed to enter quietly.

4. A man's house is *not* his castle when some one else has got the better of him in an action of ejectment. In this case, of course, it has ceased to be his *house* at all, and therefore has ceased to be his castle.

5. A man's house is *not* his castle when the *outer* door is open. The sheriff having once gained admission into the house may break open as many inner doors as he pleases.

6. A man's house is *not* his castle for any one *except himself and his family*. He may not shelter therein a person who takes refuge in his house, or who removes his goods there to prevent the sheriff getting hold of them.

ACTIONS AGAINST MAGISTRATES.

CREPPS v. DURDEN.

[Cowp. 640; 1 Smith's Ld. Cas. 800.]

One Sunday morning Peter Crepps, instead of being at church was selling hot rolls on the streets of London to whoever would buy. As this could not be construed as a "work of necessity or charity" Peter was brought before Magistrate Durden and charged with exercising his ordinary calling on the Lord's Day, contrary to a statute of Charles II. which prohibited such goings on on Sunday under a penalty of 5s. Now, as it happened that Peter had sold four hot rolls, the worthy magistrate fined him £1, that is to say 5s a roll. But Peter was dissatisfied with this proceeding, and soon after commenced an action of trespass against the magistrate. He was successful, all the judges agreeing that Peter had been fined 15s. too much. Said Lord MANSFIELD: "The penalty incurred by this offence is 5s. There is no idea conveyed by the act that if a tailor sews on the Lord's Day every stitch he takes is a separate offence, or if a shoemaker or carpenter works for different customers at different times on the same Sunday that those are so many separate and distinct offences. There can be but one entire offence on one and the same day."

*MALICIOUS PROSECUTION.***MUNNS v. DUPONT.**

[3 Wash. C. Ct. 31; 1 Am. Ld. Cas. 200.]

Munns, the superintendent of a powder factory in Virginia, went up to Delaware to endeavor to find out the process employed in a factory there owned by Dupont & Co. He approached the workmen, induced one of them to procure him patterns of the machinery they used, and also an important piece of the machinery itself. Dupont & Co. were very angry; they had taken great pains to preserve the secrets of their trade, and so when they heard that he had left the place they followed him to Philadelphia, where they had him arrested for stealing their property. He was brought back to Delaware, but in the end was acquitted of the charge. Then he brought an action against Dupont & Co. for malicious prosecution, alleging that he had been greatly damaged by the acts of the firm in maliciously arresting him on a charge not founded on truth. But it was held that this was not the question at all. The question was, Was the charge made maliciously *and* without probable cause — probable cause being defined as “a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged.” Therefore, if Dupont & Co. had this “reasonable cause,” it did not matter at all how much malice they

may have had against Munns. The court decided that they had reasonable cause for the charge, so Munns went home without his damages.

*SLANDER — DEFAMATORY WORDS, WHEN
ACTIONABLE AND WHEN NOT.*

POLLARD v. LYON.

[91 U. S. 225.]

Mrs. Pollard, though unsuccessful, did not go to law without some provocation. She sued Lyon for slander, for having made, on several occasions, the following rather personal statement in regard to her: "I looked over the transom and saw Mrs. Pollard in bed with Capt. Denty." She averred that the charge was false, and that the slander had damaged and injured her in her good name and fame to the extent of, at least, \$10,000. Notwithstanding all this she did not recover anything.

Defamatory words spoken by one person of another, said the court, are not actionable except in four cases:

1. When they impute to the party the commission of some criminal offence involving moral turpitude for which the party, if the charge is true, might be indicted and punished. Mrs. Pollard's case did not

come within this exception, because the words used by Mr. Lyon charged her with fornication, and fornication was not an indictable offence in the District of Columbia, where the words were spoken and the action was commenced.

2. When they impute that the party is infected with some contagious disease, where, if the charge was true, it would exclude him from society. Mrs. Pollard's case was obviously not one of this kind.

3. When they affect the party in his office, trade, or occupation. Nor could the lady's case fall within this exception. But see Mr. Lumby's case on the next page.

4. When they cause the party special damage. Mrs. Pollard had not shown any "special damage" as that term is understood in the law, and therefore she could not recover under this head.

And therefore Mrs. Pollard's action, not having a single legal leg to stand on, fell, of course, to the ground.

LUMBY v. ALLDAY.

[1 Crompt. & J. 301; Big. Ld. Cas. Torts, 87.]

Mr. Lumby had a comfortable situation as clerk in the office of the Birmingham Gas Company. Mr. Lumby had also an enemy. One afternoon this enemy, one Allday, meeting him in the street, and not caring the least for the people around, who heard all

he said, abused Mr. Lumby in very forcible, if not elegant language. "You are a fellow," said he, "a disgrace to the town; you are unfit to hold your situation for your conduct with whores. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold." Lumby's only reply was an action for slander, which he at once instituted, alleging that he was a clerk in the Birmingham Gas Company, and that Allday, in order to cause it to be believed that he was an improper person to hold his situation, spoke the words above mentioned. But the court held that no action would lie, there being no proof of the slander having caused him any *special* damage. "The charge," they said, "is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk."¹

¹ The defamatory words to be actionable *per se* must affect him in his particular calling, *i.e.*, must impute the lack of some essential qualification for the occupation or calling he is engaged in; it is not enough that his general reputation is affected thereby. The charge against Mr. Lumby certainly affected his general reputation, but it did not follow that, if it was true, he was unfit to be a clerk. A most terrible *roué* might be a very valuable book-keeper. So where D, who was an attorney, had become involved in transactions on the turf, and R said of him, "he has defrauded his creditors, and has been horse-whipped off the course at Doncaster," these words were held not to be actionable, because the creditors referred to were sporting creditors, and if his clients were satisfied with his skill as a lawyer, it did not follow that they would withdraw their business simply because he did not pay his gambling debts. *Ayre v. Craven*, 2 Ad. & E. 2. On the other hand, where morality is required in a particular calling, to impute immorality to one pursuing that calling is actionable *per se*. Thus, to charge a minister of the gospel with being drunk, or being guilty of obscene

*DAMAGES IN ACTIONS OF TORT.***VICARS v. WILCOCKS.**

[8 East, 1; 2 Smith's Ld. Cas. 461.]

Stored in his rope-yard, Mr. Wilcocks had a quantity of excellent cordage, which he was disgusted one day to find cut to ribbons. For reasons which the reporter does not favor us with, Mr. Wilcocks' suspicion rested on one Vicars, the servant of his neighbor, Mr. Joshua Oakley, and not being the man to keep his opinions to himself, he proclaimed loudly on the housetops and in language the very plainest, that Vicars was the scamp who had cut his cordage. By-and-by it came to the ears of the worthy Mr. Oakley that one of his servants had been damaging his neighbor's property. He was highly incensed, and although Vicars had been engaged for a year, which was not nearly expired, he immediately and without taking the trouble to sift the matter, discharged him. Turned away by his master,

practices, would be actionable *per se*. The student who wishes to pursue this subject further is referred to a paper on "The Slander of a Person in his Calling," in the *American Law Review* for September, 1881.

Slander, *i.e.*, oral defamation, must be carefully distinguished from libel; *i.e.*, written or printed defamation, as the legal rules relating to the actionable quality of each are very different. Any publication, "the tendency of which is to degrade or injure another person, to bring him into contempt, ridicule or hatred, which accuses him of a crime punishable by law, or of an act odious and disgraceful to society, is a libel, and will entitle the injured party to damages." *Dexter v. Spear*, 4 Mason, 115.

the maligned Vicars sought employment from a Mr. Roger Prudence ; but Roger, too, had heard of the cut cordage and refused to take the reputed proprietor of the outrage into his service on any terms. In this extremity a happy thought, as the luckless litigant then considered it, occurred to him : why not bring an action against the owner of the cordage for slander, and lay as special damage the dismissal by Oakley and the rejection by Prudence. But the result did not correspond to his sanguine anticipations, for the court decided against him on two grounds :

1. Because the first special damage, viz. : the dismissal by Oakley, was not the legal, but the illegal consequence of Wilcocks' words — illegal for Vicars had been engaged for a year, and therefore his master had no right to dismiss him in this summary way. “ The special damage,” said Lord ELLENBOROUGH, “ must be the legal and natural consequence of the words spoken. * * * Here it was an illegal consequence, a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse pond, by way of punishment for his supposed transgression.” But on this point see the next case.

2. Because it was far more likely that Prudence's refusal to employ him arose from the simple *fact* of his having been dismissed from his last place than from the *reason* for such dismissal.

LUMLEY v. GYE.

[2 El. & Bl. 215.]

Mr. Lumley, the proprietor of Her Majesty's Theatre, London, had engaged a very fascinating and accomplished actress, Mademoiselle Johanna Wagner, to appear at his theatre in opera, twice a week for three months from the first day of April, 1852. Miss Wagner was to receive a salary of \$500 a week, and she expressly agreed that she would not, during that time, use her talents at any other theatre. Now Mr. Gye, a rival manager, and proprietor of Covent Garden Theatre, when he heard of this contract did not like it at all, for he wanted a new star at his house. The end of it was that by offering her a larger salary, Mr. Gye persuaded Miss Wagner to break her engagement with Mr. Lumley, and to perform for him. For this interference and the damages which were caused by the actress's breach of contract, Mr. Lumley brought an action against Mr. Gye.¹ The court held that the action would lie. "It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break

¹ Before taking this course, however, the long-headed Mr. Lumley applied to the Court of Chancery in the matter, and asked an injunction to prevent her from singing at Gye's Theatre. The court granted the injunction. "It is true," said Lord St. LEONARDS, the Lord Chancellor, "that I have not the means to compel her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement." *Lumley v. Wagner*, 1 De G. M. & G. 606. But as Lumley would not have her now, and Gye could not, the actress went home to reflect that honesty is perhaps the best policy after all.

her contract," said WIGHTMAN J., "and therefore a tortious act of the defendant maliciously to procure her to do so, and if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem * * * that an action on the case is maintainable."

This case has practically overruled *Vicars v. Wilcocks* on one point. In *Vicars v. Wilcocks* it was laid down that the damage in respect of which an action is brought must have been the *legal* consequence of the defendant's act. If, the court said, as the consequence of the defendant's slander, a mob had ducked the plaintiff in a horse-pond, such a consequence would be an *illegal* and unnatural consequence of the slander, and could not be taken into account in estimating the compensation to be paid by the defendant to the plaintiff. *Lumley v. Gye*, however, alters this rule by allowing the wrongful act of a third party to form part of the damage where such wrongful act might be naturally contemplated as likely to arise from the defendant's conduct.¹

NO CONTRIBUTION BETWEEN DEFENDANTS
IN TORT.

MERRYWEATHER v. NIXAN.

[8 Term Rep. 186; 2 Smith's Ld. Cas. 457.]

Merryweather and Nixan, in the fulness of their ani-

¹ Shirlev Ld. Cas. 239.

mal spirits, destroyed the machinery and injured the mill of one Starkey. The mill-owner was not prepared to submit tamely, and brought an action against the pair of them. The jury gave him £840 as damages, and, instead of getting £420 from each he made Merryweather pay the whole £840. Merryweather — small blame to him — did not see why he should pay for Nixan's whistle as well as his own, and sued his "pal" for contribution, that is to say, for £420. In fairness, of course, Nixan ought to have made no difficulty about paying it; but he steadfastly declined to do anything of the sort. The law backed him up in this refusal, for *ex turpi causa non oritur actio*, which means that a man shall not be allowed to found an action on something that he ought to be ashamed of; and Merryweather ought to have been very much ashamed, indeed, of having injured Starkey's mill.

There is no contribution, said the court, between defendants in tort. In contract there is. If there are two sureties, and one of them is made to pay the whole debt, he can sue his brother surety for half of what he has paid. In such a case there is no *turpis causa*.

XVI. — EVIDENCE, ETC.

HEARSAY EVIDENCE.

DIDSBURY v. THOMAS.

[14 East, 323; 2 Smith's Ld. Cas. 444.]

Like all land cases, this is a very dry one, and the student will doubtless be better able to grasp the principles which it announced, after a short preliminary study of the more modern and more entertaining case of *Bardell v. Pickwick*, 2 Dick. 104, a reporter with which most readers are already pretty familiar. In the course of this trial before Mr. Justice STARLEIGH, Mr. Samuel Weller, it will be remembered, was called as a witness. We give the scene in the exact words of the genial reporter: —

Sergeant Buzfuz now rose with more importance than he had yet exhibited, if that were possible, and vociferated, "Call Samuel Weller."

It was quite unnecessary to call Samuel Weller; for Samuel Weller stepped briskly into the box the instant his name was pronounced; and placing his hat on the floor, and his arms on the rail, took a bird's-eye view of the bar, and a comprehensive survey of the bench with a remarkably cheerful and lively aspect.

"What's your name, sir?" inquired the judge.

"Sam Weller, my Lord," replied that gentleman.

"Do you spell it with a 'V' or a 'W'?" inquired the judge.

"That depends upon the taste and fancy of the speller, my Lord," replied Sam, "I never had occasion to spell it more than once or twice in my life, but I spells it with a 'V.'"

Here a voice in the gallery exclaimed aloud, "Quite right, too, Samivel, quite right. Put it down a we, my Lord, put it down a we."

"Who is that, who dares to address the court?" said the little judge, looking up, "Usher."

"Yes, my Lord."

"Bring that person here instantly."

"Yes, my Lord."

But as the usher did not find the person, he did not bring him; and, after a great commotion, all the people who had got up to look for the culprit, sat down again. The little judge turned to the witness as soon as his indignation would allow him to speak, and said: —

"Do you know who that was, sir?"

"I rayther suspect it was my father, my Lord," replied Sam.

"Do you see him here now?" said the judge.

"No, I don't, my Lord," replied Sam, staring right up into the lantern in the roof of the court.

"If you could have pointed him out, I would have committed him instantly," said the judge.

Sam bowed his acknowledgments and turned, with unimpaired cheerfulness of countenance, towards Sergeant Buzfuz.

"Now, Mr. Weller," said Sergeant Buzfuz.

"Now, sir," replied Sam.

"I believe you are in the service of Mr. Pickwick, the defendant in this case. Speak up, if you please, Mr. Weller."

"I mean to speak up, sir," replied Sam, "I am in the service o' that 'ere gen'l'm'n, and a wery good service it is."

"Little to do and plenty to get, I suppose?" said Sergeant Buzfuz, with jocularly.

"Oh, quite enough to get, sir, as the soldier said ven they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier, or any other man said, sir," interposed the judge, "it's not evidence."

Didsbury v. Thomas, illustrates the rule, that what the other man said is not evidence, because the other man was not under oath when he said it. One Ann

Didsbury brought an action of ejectment to get hold of a farm of thirty-five acres, called the Meadow Farm, in Derbyshire. She claimed it under the will of a Mr. Samuel White. The will was dated November 26, 1754, and the chief obstacle to Ann's success was to prove that the lands were the testator's at that time. In support of her case she called a witness who swore that the farm in question, together with another farm called Foxlow's Croft, was reputed to have been Sir John Statham's, and to have been purchased at the same time with it, by Samuel White of Sir John. That, of course, alone did not fix any particular date. But to supplement this evidence, and make it serve the good woman's cause, a deed was produced dated March 25, 1752, whereby in consideration of natural love and affection old Samuel White bargained and enfeoffed his son Edward of Foxlow's Croft, "all which said farm, etc., have been lately purchased, *amongst other lands and hereditaments*, by the said Samuel White, of and from Sir John Statham."

It was clearly proved that Richard, the testator's eldest son, had taken possession of and occupied the Meadow Farm at the same time that his younger brother Ned had begun to occupy Foxlow's Croft; and also that the person immediately preceding Richard in the occupation of the Meadow Farm was tenant to Sir John: and the plaintiff's counsel argued that under the circumstances the evidence of reputation could be received. It was held, however, that the evidence could not be received, as it was only hearsay.

Hearsay — *i.e.*, what the other man said, or to speak more correctly, statements made by a person not called as a witness — is not admissible in evidence in

courts of law. But, as usual, we no sooner announce the rule than we come upon the exceptions. These exceptions are as follows.¹

1. *Hearsay is admissible, respecting matters of public and general interest*, such as the boundaries of counties or townships, claims of highways, etc. The reason for the exception in this case is that the origin of such rights is generally obscure and incapable of better proof; that people living in the district are naturally interested in local matters and likely to know about them, and that reputation cannot well exist without the concurrence of many persons who are strangers to one another and yet equally interested. Such declarations, however, to be evidence must have been made *ante litem motam*, that is, before any dispute on the subject has arisen. They must also be confined to *general matters*, and not touch *particular facts*.² ILLUSTRATIONS. — The question is whether a road is public. A statement by A. (deceased), that it is public, is admissible.³ A statement by A. (deceased), that he planted a willow, still standing, to show where the boundary of the road had been when a boy, is inadmissible.⁴

2. *Hearsay is admissible in matters of pedigree*. ILLUSTRATION. — The question is which of three sons (Fortunatus, Stephanus, and Achaicus), born at a birth,

¹ On this subject the student will do well to consult Mr. Justice STEPHEN'S admirable Digest of the Law of Evidence. From this work I have taken the illustrations given in the remainder of this case.

² Shirley Ld. Cas. 243.

³ Crease v. Barrett, 1 Crompt. M. & R. 919.

⁴ Reg v. Bliss, 7 Ad. & E. 550.

is the eldest. The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (See 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string around the second child's arm to distinguish it, are relevant." Such declarations, together with inscriptions on tombstones, entries in family Bibles, and the like, are admissible on the principle that they are the natural effusions of a person who must know the truth and has no motive for misrepresenting it.

3. *An admission previously made by a party to the action, or one interested in it is admissible.* ILLUSTRATION. — The assignee of a bond sues the obligor in the name of the obligee. An admission on the part of the obligee, that the money due has been paid, is admissible on the part of the defendant.

4. *An admission made by an agent authorized to make it, either expressly or by the conduct of the principal, is admissible.* ILLUSTRATION. — The question is, whether a parcel, for the loss of which a railroad company is sued, was stolen by one of their servants. Statements made by the station-master to a policeman, suggesting that the parcel had been stolen by a porter are admissible as against the railroad.¹

5. *A voluntary confession made by a person charged with a crime, is admissible.*

6. *Dying declarations as to cause of death are admissible in murder and manslaughter cases.*

7. *Hearsay is admissible as part of the transaction, or as it is technically called, as part of the res gestæ.*

¹ Kirkstall Brewery Co. v. Furness R. Co., L. R. 9 Q. B. 468.

Thus A.'s declaration in paying money that he pays as agent of B., is admissible.¹

8. *Hearsay is admissible as to declarations of persons since deceased, made in the ordinary course of their business.* On this point see *Price v. Torrington*,² a case of delivery of beer.

9. *Hearsay is admissible as to declarations by persons since deceased, against their interest.* On this point see *Higham v. Ridgway*,³ a case of delivery of babies.

DECLARATIONS BY PERSONS SINCE DECEASED.

PRICE v. EARL OF TORRINGTON.

[Salk. 285; 1 Smith's Ld. Cas. 390.]

This was an action by a brewer against the defendant for beer which his household had drunk. The practice at the plaintiff's brewery was for the draymen who had taken out beer during the day to sign their names in a book kept for the purpose before they hied them home for sweet repast and conjugal joys. The particular drayman who had taken Lord Torrington

¹ Whart. on Ev., sect. 262.

² *Post*.

³ *Post*, p. 277.

ton his beer was dead, but he had duly made his entry, and the question was whether it was admissible evidence for the plaintiff. It was held that it was, on the ground that it was an entry made *by a disinterested person in the ordinary course of his business*.

*DECLARATIONS BY DECEASED PERSONS
AGAINST THEIR INTEREST.*

HIGHAM v. RIDGWAY.

[10 East, 109; 2 Smith's Ld. Cas. 330.]

When was William Fowden born? This was the interesting question on which depended vast estates in the county of Chester. Elizabeth Higham laid claim to them by virtue of a certain remainder; but those who contested her right said that her remainder had been barred by a recovery suffered on April 16, 1789, by one William Fowden, since deceased. Mrs. Higham's answer to this was that on the day named William Fowden had not yet come of age, and was therefore incapable of suffering recoveries, and barring the remainders of good honest women like herself. So it was that it was strenuously disputed on which side of April 16, 1768, the late Mr. Fowden had been born. Was he or was he not of age on April 16, 1789? It was, of course, the object of Mrs. Higham to make out that he was born later than April 16; and the most important piece of evidence she adduced

in support of that view was an entry in the diary of a man-midwife who, like Fowden, had long since joined the majority. In that diary, under the head of April 22, 1768, there was this important entry:—

“W. Fowden, jun.’s, wife,

“Filius circa hor. 3 post merid. natus H.

“W. Fowden, jun.,

“April 22, filius natus

“Wife, £1 6s. 1d.

“Paid, 25 Oct., 1768.”

This entry was admitted in evidence on the ground that it was a declaration *against interest*, the law shrewdly suspecting that no one would be such a fool as to put himself down as paid when he had not been.

“The entry made by the party,” said Lord ELLENBOROUGH, C. J., “was to his own immediate prejudice when he had not only no interest to make it if it was not true, but he had an interest the other way not to discharge a claim which it appears from other evidence that he had. The evidence, therefore, in this case was properly received.”

PRESUMPTION OF DEATH FROM ABSENCE.

NEPEAN v. DOE.

[2 Mee. & W. 910; 2 Smith’s Ld. Cas. 466.]

The effect of this case is that when a person goes abroad and is not heard of for seven years, the law pre-

sumes him to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death, but does not presume that he died at any particular period during those seven years.

ESTOPPELS.

DUCHESS OF KINGSTON'S CASE.

[20 How. St. Tr. 391; Smith's Ld. Cas. 573.]

One of the most beautiful women of the last century was Sarah Chudleigh. Without going minutely into her strange eventful history, it may be said that in a weak moment she fell in love with a Captain Harvey, and married him. Married in haste she repented at leisure. Being, however, of an ingenious turn of mind, she determined to destroy the evidence of the marriage, and with that object went down to the church where the ceremony had been performed, and tore the leaf out of the register. She had scarcely accomplished this feat when the news reached her that her husband had succeeded to a peerage, and was dying. To reap the benefit of such good fortune, she went straight back to the church, and replaced the purloined leaf. Her husband, however, was not obliging enough to die, and, as the lady was very anxious to marry the Duke of Kingston and become a duchess,

she procured an irregular divorce from him and married the duke. After a few years the duke died, leaving his widow a very large fortune. This the duke's heirs were not disposed to allow her to enjoy in peace. They prosecuted her for bigamy, that is, of course, for marrying the Duke of Kingston when she had not been legally divorced from her first husband. The defence to the charge was that the divorce was a legal one, and left her free to marry the Duke of Kingston or any other man or duke.

The judges were required to answer the following questions : —

1. If a spiritual court decides that a marriage is null and void, is its decision so conclusive on the subject that the marriage cannot be proved against one of the parties in an indictment for bigamy?

2. Supposing the spiritual court's decision is final, may counsel for the prosecution destroy its effect by showing that it was brought about by fraud and collusion?

The first question was answered in the negative, so that it did not much matter to the duchess what the answer to the second was. That question, however, the judges answered in the affirmative, thus doubly settling her.

This is the "leading case" on the law of Estoppel. The definition of estoppel as given by Lord COKE is generally acknowledged to be a little startling, and to have an air of immorality about it, which only the public interest in putting an end to litigation, and the reasonableness of refusing to allow people to contradict statements on the truth of which others have acted, can justify. "An estoppel," says COKE, "is where

a man is concluded by his own act or acceptance to say the truth," and he divides estoppels into three kinds, viz.: 1. By matter of record. 2. By deed. 3. By conduct.

1. When the parties and the points litigated are the same, a former judgment rendered is conclusive. As we have already seen (*Marriott v. Hampton*) *interest reipublicae ut set finis litium*.

2. To execute a deed is like executing a murderer a very solemn thing and therefore whatever assertion a man has made in his deed he must stand by. If you execute a bond in the name of Obadiah you are estopped from pleading that your name is Augustus. So, though a person who has given an ordinary receipt may show that he has never really received the money, a person who has given a receipt under seal cannot.

Two qualifications of the doctrine of estoppel by deed must be remembered: 1. Although a person acknowledges in his deed that he has received the consideration money for the service he undertakes to perform, he may nevertheless show that as a matter of fact he has not received it. 2. A person who is sued on his *deed* may show that it is founded on fraud or illegality, and, if he proves it, the document becomes worthless. The great case on this subject is *Collins v. Blanter*,¹ which we have already seen.

3. If a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of facts exists, and acts on that inference, he will afterwards be estopped from denying it.²

Ante, p. 89; Shirley Ld. Cas. 262.

² *Cornish v. Abington*, 4 Hurl. & N. 547.

Once in England an old gentleman induced a niece to come and live with him and nurse his old age by promising to remember her in his will. But the old deceiver did not remember her. It was held, however, in an action against the executors, that he was estopped from omitting to make some provision for her, as she had altered her position in consequence of his representations.¹ Some years later in California, there was a Good Templar who kept a grocery. After a while some one discovered that liquor was being sold in the store. The proprietor protested that the liquor did not belong to him but to his clerk. A creditor of the clerk hearing this, attached it for a debt, as belonging to the clerk. Then the Good Templar finding his property about to be taken from him, declared his ownership and tried to get the liquor back. But it was too late. "If parties," said BENNETT, J., "choose to make untrue statements by which others are injured, they should be estopped to unsay that which they have said. Estoppels, in general, are odious, but in merchantile and ordinary business transactions, where men must trust to the appearances and declarations of parties because they have no other means of information in such cases, the courts have been inclined to extend the list of estoppels."²

¹ *Loffus v. Maw*, 32 L. J. (Ch.) 49.

² *Mitchell v. Reed*, 9 Cal. 204.

LOCAL AND TRANSITORY ACTIONS.

MOSTYN v. FABRIGAS.

[Cowp. 161; 1 Smith's Ld. Cas. 766.]

By the Peace of Paris, which in 1763 put an end to the Seven Years' War, the island of Minorca, in the Mediterranean, became a British possession. In 1770 the governor of this island was a gentleman named Mostyn, who, apparently, was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, a Mr. Fabrigas, did not coincide with him in this view, and he rendered himself so obnoxious that the governor laid hands suddenly on him, and, after keeping him imprisoned for a week, banished him to Spain. It was for this arbitrary treatment that Fabrigas now brought an action *at Westminster*, in England. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorca, the action could not be brought in England. But it was held that, as the cause of action was of a transitory and not a local nature, it could. And a British jury gave Fabrigas £3,000 damages.

This is the leading case on "local" and "transitory" actions. All actions fall within one or the other of these two divisions. Those which are required to be tried in a particular county because the subject-matter is connected with the particular locality

must be tried there. Others are transitory, and may be tried wherever the parties can be found.

USE OF HIGHWAYS — PLEADING.

DOVASTON v. PAYNE.

[2 H. Black. 527; 2 Smith's Ld. Cas. 200.]

Dovaston's complaint against Payne was that he had taken and impounded his cattle without rhyme or reason : —

“ My kine are gone, and I have no more,
Which Payne hath caught and doth keep away,”

was his melancholy refrain.

Called on for an explanation, Payne said he had caught the beasts breaking down his fences and ruining his crops; he had taken them *damage feasant*, in fact. Such were the replevin and the avowry. It was now Dovaston's turn to plead, which he did to this effect : —

“ Well but, my friend, if they were, as you say, in your field damaging your crops, and all the rest of it, it was entirely your fault for not keeping your fences in proper condition. There they were, — the sweet innocents, — ‘in the highway,’ and how could they know where they had a right to go and where they had not? ”

The weak point of this pleading, — probably drawn by some youthful lawyer called the day before, — was that, by alleging that his cattle were “in” the highway instead of “passing along,” *Dovaston* had not excluded the chance of their being trespassers. They might very well be “in” the highway without being quietly and peaceably “passing along” it, like sober, well-conducted cattle; and so the defendant had judgment.

On the subject of certainty in pleading, which was so much thought of in the days of special pleading, this case has lost much of its importance, since the adoption of the Codes. It is, however, still a leading case on the rights of the public over a highway.

THE PRINCIPAL MAXIMS OF THE LAW.¹

Acta exteriora indicant interiora secreta.

Overt acts declare a man's intentions and motives.

Actio personalis moritur cum personâ.

A personal right of action ceases at death.

Actus Dei nemini facit injuriam.

The act of God does injury to no man.

Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat.

Instruments ought to be construed leniently, with allowances made for the ignorance of people who are not lawyers, so that the transaction may be supported, and not rendered nugatory.

Caveat emptor.

The buyer must look after himself.

Cessante ratione, cessat lex.

When the reason for a law ceases to exist, so also does the law itself.

Contemporanea expositio est optima et fortissima in lege.

The best way of getting at the meaning of an instrument is to ascertain when and under what circumstances it was made.

Cuiuslibet in suâ arte perito credendum est.

Every man is an expert in the particular branch of business he is familiar with.

¹ With some alterations and additions from Shirley's *Ld. Cas.*, 291-294.

Delegatus non potest delegare.

A person having mere delegated authority cannot himself delegate that authority to another.

De minimis non curat lex.

The law does not trouble itself about trifles.

Domus sua est cuique tutissimum refugium.

A man's house is his safest retreat.

Ex dolo malo non oritur actio.

No cause of action can grow out of a questionable transaction.

Ex nudo pacto non oritur actio.

In order to ground an action, an agreement must have a consideration.

Expedit reipublicæ ne quis suâ re male utatur.

The good of the State requires a man not to injure his own property.

Expressum facit cessare tacitum.

When all the terms are expressed, nothing can be implied.

Ignorantia facti excusat, ignorantia juris non excusat.

A man may be pardoned for mistaking facts, but not for mistaking the law.

In contractis tacite insunt quæ sunt moris et consuetudinis.

Persons are presumed to contract with reference to habits and customs.

In jure non remota sed proxima causa spectatur.

It is not the remote, but the immediate cause that the law looks at.

Interest reipublicæ ut sit finis litium.

It is the interest of the State that litigation should end.

Lex non cogit ad impossibilia.

The law does not compel a man to perform impossibilities.

Lex semper intendit quod convenit rationi.

The law must be taken to intend what is reasonable.

Lex spectat naturæ ordinem.

The law takes into account the natural succession of things.

Modus et conventio vincunt legem.

Persons may contract themselves out of their legal liabilities.

Non dat qui non habet.

A man cannot give what he has not got.

Non omnium quæ a majoribus constituta sunt ratio reddi potest.

A reason cannot be given for everything that has been established by our ancestors.

Omnia præsumuntur contra spoliatorem.

Every presumption is made to the disadvantage of the wrong doer.

Omnia præsumuntur rite et sollenniter esse acta.

It is presumed that all the usual formalities have been complied with.

Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.

A ratification is taken back and made equivalent to a previous command

Optima est lex quæ minimum relinquit arbitrio iudicis, optimus iudex qui minimum sibi.

The best system of law is that which leaves the least to the discretion of the judge; the best judge is he who leaves the least to his own discretion.

Potior est conditio possidentis.

The one in possession has the "inside track."

Qui facit per alium, facit per se.

He who does a thing by another does it himself.

Qui hæret in literâ hæret in cortice.

He who harps on a mere written instrument does not get at the pith of the matter.

Qui prior est tempore, potior est jure.

The law favors the earlier in point of time.

Qui sentit commodum, sentire debet et onus.

Benefit and burden ought to go hand in hand.

Quicquid plantatur solo, solo cedit.

Whatever is planted in the ground becomes part of the ground.

Quilibet potest renunciare juri pro se introducto.

A man may waive a right established for his own benefit.

Quod fieri non debet factum valet.

What ought never to have been done at all, if it has been done, may be valid.

Quod subintelligitur, non deest.

What is to be understood, is as good as if it were there.

Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.

When the language of a written instrument is perfectly plain, no construction will be made to contradict the language.

Res inter alios acta alteri nocere non debet.

A man ought not to be prejudiced by what has taken place between others.

Res ipsæ loquitur.

The thing itself speaks.

Res judicata pro veritate accipitur.

The decision of a court of justice is assumed to be correct.

Respondet superior.

A man must answer for his dependents.

Salus populi suprema lex.

The welfare of the State is the highest law.

Sic utere tuo ut alienum non lædas.

Make such a use of your own property as not to injure your neighbor's.

Solvitur secundum modum solventis.

Payment is to be made as the payer pleases.

Spondes peritiam artis.

If your position implies skill, you must use it.

Ubi jus, ibi remedium.

Where there is a right, there is a remedy.

Verba chartarum fortius accipiuntur contra proferentem.

The language of an instrument is to be taken strongly against the person whose language it is.

Verba generalia restringuntur ad habilitatem rei vel personarum.

General words are to be tied down and interpreted according to their context.

Vigilantibus non dormientibus jura subveniunt.

To get the law's help a man must not go to sleep over his own interests.

Volenti non fit injuria.

The man who is the author of his own hurt has no right to complain.

TABLE OF ABBREVIATIONS IN THIS VOLUME.

Ad. & E. . . .	Adolphus and Ellis's Queen's Bench Reports, 1834-1840. ¹
Ala. . . .	Alabama Supreme Court Reports, 1840.
Allen	Allen's Massachusetts Reports, 1861-1867.
Am. Dec. . . .	American Decisions, 1878- ²
Am. Ld. Cas. . .	American Leading Cases.
App. Cas. . . .	English Appeal Cases, ³ 1876.
Barb. . . .	Barbour's New York Supreme Court Reports, 1847-1875.
Barn. & Adol. .	Barnwell and Adolphus's King's Bench Reports, 1830-1834.
Barn. & Ald. . .	Barnwell and Alderson's King's Bench Reports, 1817-1822.
Barn. & Cress. .	Barnwell and Cresswell's English King's Bench Reports, 1822-1830.

¹ The second series of these reports, extending from 1841 to 1852, is sometimes cited Ad. & E. (N. s.), but the correct citation is Q. B.

² This is a work published by A. L. Bancroft & Co., San Francisco, and containing all the cases of general value and authority decided in the courts of the several States from the earliest issue of the State Reports to the year 1869. About thirty-three volumes are now out, reaching to 1838. It is edited by A. C. Freeman, Esq., the author of *Treatises on Executions and Judgments*, and is of great value to the profession, as the number of State Reports run now into the thousands, and a complete collection of them is something quite beyond the means of the majority of lawyers.

³ In this series are reported the judgments on appeal of the English House of Lords and Privy Council.

Best & S. . . .	Best and Smith's Queen's Bench Reports, 1861-1870.
Big. Ld. Cas. . .	Bigelow's Leading Cases on Bills, Notes, Bills & Notes . . . and Checks (2d ed.). Boston, 1880.
Big. Ld. Cas. . .	Bigelow's Leading Cases on Torts Boston, Torts 1875.
Bing.	Bingham's English Common Pleas Reports, 1822-1834.
Bing. (N. C.). .	Bingham's English Common Pleas Reports (new cases), 1834-1840.
Black	Black's United States Supreme Court Reports, 1861-1862.
Black., H. . . .	See H. Black.
Black., W. . . .	See W. Black.
Blackf.	Blackford's Indiana Reports, 1817-1847.
Bosw.	Bosworth's New York Superior Court Reports, 1857-1863.
Brock.	Brockenbrough's Reports of Chief Justice Marshall's Decisions, 1802-1833.
Burr.	Burrow's English King's Bench Reports, 1757-1771.
Cal.	California Supreme Court Reports, 1850-
/ Camp.	Campbell's English Nisi Prius Reports, 1808-1816.
Car. & P.	Carrington and Payne's English Nisi Prius Reports, 1823-1841.
C. B.	{ English Common Bench (or Pleas) Reports, old and new series, 1845-1856; 1856-1865.
C. B. (N. S.) . .	
Cent. L. J. . . .	Central Law Journal, 1874- .
Coke	Coke's English King's Bench Reports, 1572-1616.
Conn.	Connecticut Supreme Court Reports, 1814- .
Cow.	Cowen's New York Reports, 1823-1829.

- Cowp. . . . Cowper's English King's Bench Reports,
1774-1778.
- Cranch . . . Cranch's United States Supreme Court
Reports, 1800-1815.
- Croke . . . Croke's English King's Bench Reports,
1582-1641.
- Crompt. & J. . . Crompton and Jervis's English Exchequer
Reports, 1830-1832.
- Crompt. M. & R. . Crompton, Meeson and Roseoe's English
Exchequer Reports, 1834-1836.
- Cush. . . . Cushing's Massachusetts Reports, 1848-
1853.
- De G. M. & G. . DeGex, Macnaghten and Gordon's English
Chancery Reports, 1851-1857.
- Denio . . . Denio's New York Reports, 1845-1848.
- Dill. . . . Dillon's United States Circuit Court Re-
ports, 1870-1878.
- Dougl. . . . Douglass's English King's Bench Reports,
1778-1784.
- Dow. & Ry. . . Dowling and Ryland's English King's
Bench Reports, 1821-1827.
- East . . . East's English King's Bench Reports,
1801-1812.
- El. & Bl. . . . Ellis and Blackburn's English Queen's
Bench Reports, 1852-1858.
- Ewell on Dis. . . Ewell's Leading Cases on the Disabilities
of Inf. . . of Infancy and Coverture. Chicago,
1876.
- Ex. . . . English Exchequer Reports, 1847-1856.
- Ex. Div. . . . English High Court, Exchequer Division,
Reports, 1875- .
- Grant's Cas. . . Grant's Pennsylvania Cases, 1852-1863.
- Gratt. . . . Grattan's Virginia Reports, 1844-1881.
- Gray . . . Gray's Massachusetts Reports, 1854-1860.

Halst. . . .	Halstead's New Jersey Reports (Law), 1821-1831.
H. Black. . .	Henry Blackstone's English Common Pleas Reports, 1788-1796.
Hill	Hill's New York Reports, 1841-1844.
H. L. Cas. . .	English House of Lords Cases, 1847-1865.
Hob.	Hobart's English King's Bench Reports, 1603-1625.
How.	Howard's United States Supreme Court Reports, 1843-1860.
How. St. Tr. . .	Howell's English State Trials, 1163-1820.
Hurl. & C. . .	Hurlstone and Coltman's English Ex- chequer Reports, 1862-1865.
Hurl. & N. . .	Hurlstone and Norman's English Ex- chequer Reports, 1856-1861.
Ill.	Illinois Supreme Court Reports, 1819-
Ind.	Indiana Supreme Court Reports, 1848-
Johns.	Johnson's New York Reports, 1806-1823.
Kas.	Kansas Supreme Court Reports, 1862-
Langd. Cas. on	Langdell's Select Cases on the Law of
Con.	Contracts (2nd ed.). Boston, 1879.
Lawson Cont.	Lawson on Contracts of Common Carriers.
Carr.	St. Louis, 1880.
Lawson Us. . .	Lawson on Usages and Customs, with
& C.	Illustrative Cases. St. Louis, 1881.
Ld. Raym. . .	Raymond's (Lord) English King's Bench Reports, 1694-1734.
L. J. (Exch or	The English Law Journal, 1866-
Ch.)	
L. R. C. P. . .	English Law Reports, Court of Common Pleas, 1866-1875.
L. R. Ex. . . .	English Law Reports, Court of Exchequer, 1866-1875.

- L. R. H. L. . . English Law Reports, House of Lords,
1866-1875.
- L. R. Q. B. . . English Law Reports, Court of Queen's
Bench, 1866-1875.
- Mac. & G. . . Macnaghten and Gordon's English Chan-
cery Reports, 1849-1851.
- Mason Mason's United States Circuit Court Re-
ports, 1816-1830.
- Mass. Massachusetts Supreme Judicial Court
Reports, 1804-1822 ; 1867-
- Me. Maine Supreme Court Reports, 1820-
- Mee. & W. . . Meeson & Welsby's English Exchequer
Reports, 1836-1847.
- Metc. Metcalf's Massachusetts Reports, 1840-
1847.
- Mich. Michigan Supreme Court Reports, 1847-
- Mo. Missouri Supreme Court Reports, 1821-
- N. J. (L.) . . New Jersey Supreme Court Reports,
1790-
- N. Y. New York Court of Appeals Reports,
1847-
- Paige Paige's New York Chancery Reports.
1828-1845.
- Peak. Ad. Cas. . Peake's English Nisi Prius Cases (addi-
tional), 1790-1812.
- Pet. Peters' United States Supreme Court Re-
ports, 1827-1842.
- Pick. Pickering's Massachusetts Reports, 1822-
1842.
- P. Wms. . . . Peere Williams's English Chancery Re-
ports, 1695-1736.

Q. B.	English Queen's Bench Reports, 1841-1852. ¹
Q. B. Div. . . .	English High Court, Queen's Bench Division, Reports, 1875-
Salk.	Salkeld's English King's Bench Reports, 1689-1712.
Serg. & R. . . .	Sergeant and Rawle's Pennsylvania Reports, 1814-1828.
Shirley Ld. Cas. .	Shirley's Leading Cases Made Easy. London, 1880.
Sid.	Siderfin's English King's Bench Reports, 1657-1670.
Skin.	Skinner's English King's Bench Reports, 1681-1698.
Smith's Ld. Cas. .	Smith's Leading Cases. ²
Stra.	Strange's English King's Bench Reports, 1716-1749.
Taun.	Taunton's English Common Pleas Reports, 1808-1819.
Taylor's L. . . .	Taylor's Treatise on Landlord and Tenant.
& T.	(7th ed.) Boston, 1879.
Term Rep. . . .	Term Reports, English King's Bench, 1785-1800. ³
Thomp. Ld. Cas. .	Thompson's Leading Cases on Carriers of Carr. Pass. . . . Passengers. St. Louis, 1880.
Thomp. Ld. Cas. .	Thompson's Leading Cases on Negligence. Neg. St. Louis, 1880.

¹ This series is sometimes, though improperly, cited, Ad. & E. (N. S.) after the reporters, Adolphus and Ellis.

² The seventh American edition of this great work was published in Philadelphia in 1872.

³ This series is sometimes cited Durn. & E., after the names of the reporters, Durnford and East.

U. S.	United States Supreme Court Reports, 1875—
Ves.	Vesey's English Chancery Reports, 1789— 1816.
Vt.	Vermont Supreme Court Reports, 1826—
Wall.	Wallace's United States Supreme Court Reports, 1863—1875.
Wall. jr.	Wallace's United States Circuit Court Reports, 1842—1862.
Wash. C. Ct.	. .	Washington United States Circuit Court Reports, 1803—1827.
W. Black.	. .	Blackstone's English King's Bench Re- ports, 1746—1780.
Week. Rep.	. .	English Weekly Reporter, 1853—
Wend.	Wendell's New York Reports, 1828—1841.
Wheat.	Wheaton's United States Supreme Court Reports, 1816—1827.
Wils.	Wilson's English King's Bench Reports, 1742—1774.
Willes	Willes's English Common Pleas Reports, 1737—1760.

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